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EDITOR'S NOTE

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No. 86-475-CFX
Status: GRANTED

Title: David C. Frazier, Petitioner
v.
Frederick J. R. Heebe, Chief Judge, United States District Court for the Eastern District of Louisiana, et al.

Docketed:
September 23, 1986

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Hitchcock, Cornish F.

Counsel for respondent: Boisfontaine, Curtis R.

Entry	Date	Note	Proceedings and Orders
1	Sep 23 1986	G	Petition for writ of certiorari filed.
2	Oct 25 1986	G	Motion of American Corporate Counsel Association for leave to file a brief as amicus curiae filed.
3	Oct 28 1986		Brief of respondents in opposition filed.
4	Oct 29 1986		DISTRIBUTED. November 14, 1986
5	Nov 7 1986	X	Reply brief of petitioner David Frazier filed.
6	Nov 17 1986		Motion of American Corporate Counsel Association for leave to file a brief as amicus curiae GRANTED.
7	Nov 17 1986		Petition GRANTED.
			**********
8	Nov 26 1986	G	Motion of petitioner to dispense with printing the joint appendix filed.
9	Dec 2 1986		Certified copy of original record and C. A. proceedings, 5 volumes, received. (Box).
10	Dec 2 1986		Record filed.
11	Dec 8 1986		Motion of petitioner to dispense with printing the joint appendix GRANTED.
13	Dec 18 1986		Order extending time to file brief of petitioner on the merits until January 16, 1987.
14	Jan 16 1987		Brief of petitioner David Frazier filed.
15	Jan 16 1987	G	Motion of American Corporate Counsel Association for leave to file a brief as amicus curiae filed.
16	Feb 17 1987		Brief of respondent Heebe, Chief Judge, etc. filed.
17	Feb 23 1987		Motion of American Corporate Counsel Association for leave to file a brief as amicus curiae GRANTED.
18	Mar 13 1987		CIRCULATED.
19	Mar 11 1987		SET FOR ARGUMENT. Wednesday, April 29, 1987. (1st case).
20	Apr 11 1987	X	Reply brief of petitioner David Frazier filed.

PETITION FOR WRIT OF CERTIORARI

86-475

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DAVID C. FRAZIER,
Petitioner,

v.

HONORABLE FREDERICK J.R. HEEBE, Chief Judge,
United States District Court for the
Eastern District of Louisiana, *ET AL.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cornish F. Hitchcock
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W. Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

Of counsel:
Gary L. Roberts
Roberts and Clark
P.O. Box 237
Pascagoula, Miss. 39567
(601) 762-7104

September 1986

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QUESTION PRESENTED*

May a federal district court require applicants for admission to its bar to live or maintain an office in the state where that court sits, when such a requirement would be unconstitutional if imposed by a state court?

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* Other respondents not identified in the caption are the Honorable Morey L. Sear, the Honorable Charles Schwartz, Jr., the Honorable Robert F. Collins, the Honorable Adrian G. Duplantier, the Honorable George Arceneaux, Jr., the Honorable Veronica D. Wicker, the Honorable Patrick E. Carr, the Honorable Peter Beer, the Honorable A.J. McNamara, the Honorable Henry A. Mentz, Jr., the Honorable Martin L.C. Feldman, and the Honorable Marcel Livaudais, Jr.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner David C. Frazier respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

REFERENCES TO OPINIONS

The opinion and judgment of the United States District Court for the Eastern District of Louisiana are reproduced in the Appendix ("App.") at pages 23a-43a, and the opinion is reported at 594 F. Supp. 1173 (1984). The opinion of the United States Court of Appeals for the Fifth Circuit and the dissent are reported at 788 F.2d 1049 (1986) and appear at pages 1a-19a of the Appendix. The court of appeals' unpublished order denying rehearing appears at App. 20a-21a, and its judgment is reproduced at App. 22a.

JURISDICTION

The judgment of the court of appeals was entered on 24 April 1986, and rehearing was denied on 25 June 1986. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The pertinent constitutional provisions and the court rules at issue here are reproduced at pages 44a-48a of the Appendix.

STATEMENT OF THE CASE

Petitioner David C. Frazier is a member of the Mississippi and Louisiana bars who lives and practices law in Pascagoula, Mississippi. He is also admitted to practice in the United States Courts of Appeals for the Fifth and Eleventh Circuits, as well as the United States District Court for the Southern District of Mississippi (App. 1a).

In April 1982, after petitioner had taken the Louisiana bar examination and been admitted to the Louisiana state bar, he sought admission to the bar of the United States District Court for the Eastern District of Louisiana (the "Eastern District"), which sits in New Orleans, approximately 110 miles from where petitioner lives and practices. His application was denied solely because he did not "reside[] or maintain[] an office for the practice of law in the State of Louisiana," as required by Eastern District Rule 21.2 (App. 2a). This requirement, which was adopted by the judges in the Eastern District, applies not only at the time of admission, but for as long as the lawyer wishes to remain a member in good standing of the Eastern District bar. Eastern District Rule 21.3.1 (App. 44a-46a).

In order to evaluate the issues presented here, it is important to distinguish between what these rules do and do not require. The rules do not require members of the Eastern District bar to live or maintain an office within that District, nor even within a

fixed radius from the courthouse. Instead, they require members of the Eastern District bar to live or have an office somewhere in the state of Louisiana, even if they are located hundreds of miles from New Orleans. Thus, lawyers who live or have an office in Shreveport, Lake Charles or Monroe, Louisiana—each of which is over 200 miles from New Orleans—can be licensed in the Eastern District and can practice there without local counsel. Indeed, they can serve as "local" counsel for lawyers such as petitioner, even though they live or practice considerably further from New Orleans than do these out-of-staters for whom they are serving as local counsel. The rules even allow a lawyer based in Port Arthur, Texas, who has a satellite office in Lake Charles, Louisiana, to be admitted to the Eastern District bar, to practice there on his or her own, and to be local counsel for others.

Petitioner began this litigation by seeking a writ of prohibition from the United States Court of Appeals for the Fifth Circuit. That court declined to decide the matter and remanded the case to the Eastern District for entry of an appealable judgment (App. 2a). At the pretrial conference, the presiding judge suggested that petitioner file a complaint, which he did. The active judges in the Eastern District (who were named as defendants) recused themselves, and the case was assigned to the Honorable Edwin F. Hunter, Jr., a Senior District Judge from the Western District of Louisiana, who conducted a one-day bench trial.

Petitioner's principal claim was that the in-state residence-or-office restriction violated the Fifth Amendment's Due Process Clause. His argument relied in part on Privileges and Immunities Clause cases such as *Piper v. Supreme Court of New Hampshire*, 723 F.2d 110 (1st Cir. 1983)(*en banc*), which struck down a similar requirement for admission to a state court bar and which this Court affirmed while the present case was being briefed on appeal, 105 S. Ct. 1272 (1985). Petitioner acknowledged that the Privileges and Immunities Clause is a limit on state, not federal, action, but he urged that the *analysis* used to evaluate state discrimination against non-residents be incorporated into the Fifth Amendment's Due Process Clause in the same way that equal protection analysis has been employed

to review federal discrimination. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Alternatively, he argued that a due process violation should be found here using more traditional equal protection analysis.

The restriction was defended almost entirely on the basis of the Eastern District's experience with out-of-state *pro hac vice* practitioners, who were said to be less familiar with local rules and practices and also less available for hearings and conferences than Louisiana lawyers (App. 7a). The district court found these arguments persuasive and upheld the in-state residence-or-office restriction, finding that it was rationally related to the Eastern District's legitimate goals of assuring lawyer competence and availability for court hearings (App. 35a-37a).

A divided panel of the court of appeals affirmed. The majority opinion, written by Judge Politz and joined by Judge Jolly, declined to analyze the restriction using Privileges and Immunities Clause analysis, explaining that the rules in question had been adopted pursuant to rulemaking authority specifically delegated to the district courts by Congress, and that since petitioner was a United States citizen with representation in Congress, he did not need the sort of protection that Article IV affords non-residents injured by discriminatory state action (App. 4a).

The majority also rejected petitioner's equal protection claim, even though it "harbor[ed] no doubt" that the restriction was "overinclusive in lumping all non-residents together" and was equally "underinclusive in lumping together all lawyers who reside or maintain offices in Louisiana" (App. 7a). The majority concluded, however, "that the judges of the Eastern District acted in a reasonable manner in drawing the distinction" (*id.*), and that the challenged rules bore a "rational relationship to that court's goal of an efficient administration of justice" (App. 8a). The majority added that petitioner was not absolutely foreclosed from Eastern District practice, since he could affiliate with a Louisiana lawyer and appear *pro hac vice* (App. 8a).

Finally, the majority declined petitioner's request to invalidate the restriction under the court of appeals' supervisory powers, noting that the Judicial Council for that Circuit was

reviewing the local rules of its district courts in accordance with the 1985 amendment to Rule 83 of the Federal Rules of Civil Procedure, which is intended to promote inter-district uniformity in district court rules, adding that the three district courts in Louisiana were also reviewing their rules (App. 8a-9a).

Judge Goldberg dissented. He characterized much of the trial testimony as "general, visceral reactions and vague, anecdotal reminiscences" about *pro hac vice* practitioners which "did not rise to the level of legally probative evidence. . ." (App. 19a). He added that the experience with this group of lawyers did not provide a relevant comparison for purposes of considering whether it was rational to exclude out-of-state lawyers seeking *general* admission to the bar. The latter applicants stand on a different footing, he concluded, because "they will have invested considerably more time and money to practice in the Eastern District on a continuing basis than those admitted on a *pro hac vice* basis," *i.e.*, they are interested in "developing an ongoing and regular practice in the District"; they have taken and passed the Louisiana state bar examination; and they must pay Louisiana bar dues. As he analyzed the case, the restriction could not withstand "even the most deferential judicial review" (App. 10a). Thereafter, a petition for rehearing, with suggestion for rehearing *en banc*, was denied without opinion (App. 20a-21a).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS INCONSISTENT WITH THE PRINCIPLES AND OUTCOME IN *PIPER*, WHICH BARRED SIMILAR RESTRICTIONS IN STATE COURT SYSTEMS, AND IT RAISES IMPORTANT QUESTIONS REGARDING THE PRACTICE OF LAW IN FEDERAL COURTS.

The petition should be granted because the decision below cannot be reconciled with either the principles or the result in *Supreme Court of New Hampshire v. Piper*, 470 U.S. ____, 105 S.

Ct. 1272, 84 L. Ed. 2d 205 (1985), which invalidated a state court rule excluding non-residents from a state's bar. In reaching that decision, the Court rejected precisely the same justifications that the majority found persuasive here, *i.e.*, a ban on out-of-staters promotes attorney competence, knowledge of local practices, and availability for court hearings. *See* 105 S. Ct. at 1279-80. The majority opinion mentioned *Piper* several times in passing (App. 3a, 8a), but it failed to analyze that decision or to offer any reason why a restriction of the sort that was held unconstitutional in a state court system would be valid when imposed by a federal district court. Several facets of the court of appeals' ruling make the case worthy of review by this Court.

Piper was decided under the rigorous standard of review employed in Privileges and Immunities Clause cases. The majority opinion rejected that analysis (as well as heightened scrutiny employed in some equal protection cases) and instead examined the Eastern District's restriction under the deferential "rational basis" test. In doing so, the court of appeals glossed over fundamental questions which this Court should address, namely, why should a state court's bar admission rules be more closely scrutinized than those of a federal district court, and why should restrictions which are invalid in the former system be upheld in the latter? More particularly, if the site of a lawyer's home or office is not a valid criterion for measuring fitness to practice in state court, how can it be a valid measure of fitness to practice in federal district court?

The majority's only attempt to grapple with the anomaly created by its ruling raises more questions than it answers. The opinion postulates that since Congress delegated to the federal district courts general authority to adopt local rules, and since petitioner and other out-of-staters are represented in Congress, there is no need to employ the heightened scrutiny used in Privileges and Immunities Clause cases to protect out-of-staters who are injured by discriminatory state action (App. 3a-4a). Thus, the majority equates representation in Congress, which petitioner has, with representation in the body which wrote the discriminatory rules, which he does not have. The majority's

reasoning might have some force if the restriction here had been adopted by Congress itself; however, this case involves local rules, adopted by a local district court, with advice coming solely from local lawyers. *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). While the resulting restriction may be satisfactory to local lawyers and judges, it fails to accommodate the legitimate interests of out-of-state lawyers, as well as the clients who seek to retain them, who have no direct say in the process.

This problem of non-representation is precisely the one which the Privileges and Immunities Clause was intended to address in the context of state action. *See generally Hicklin v. Orbeck*, 437 U.S. 518 (1978). Because the effect of a rule excluding qualified out-of-staters from a federal court bar is the same as a rule excluding them from a state court bar, it should be subject to the same level of scrutiny.

Review is also warranted because the majority's sole attempt to discuss *Piper* demonstrates its inconsistency not only with *Piper*, but also with this Court's equal protection decisions, even those employing a "minimum rationality" standard of review. Thus, as evidence that the restriction was reasonable, the majority cited the fact that out-of-staters were not totally foreclosed from practicing in the Eastern District because it is relatively easy for them to affiliate with local counsel and appear *pro hac vice* (App. 7a-8a). Citing *Piper*, the majority stated that the "requirement that local counsel be associated with an out-of-state lawyer appearing *pro hac vice* has been approved, albeit in *dicta*, by the Supreme Court" (App. 8a), apparently referring to this Court's statement that a "trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and hearings." 105 S. Ct. at 1280. However, the majority overlooked language in the same paragraph in *Piper* which explicitly states that a lawyer's unavailability for short-notice hearings does *not* "justif[y] the exclusion of nonresidents" from *general* admission to the bar, even though local counsel may be required in particular cases. *Id.*

Moreover, for equal protection purposes, the existence of a *pro hac vice* option for out-of-staters cannot legitimize a discriminatory rule which excludes petitioner and others in his position who seek general admission to the Eastern District bar. We are aware of no decision which suggests that a discriminatory condition may be upheld if those who are injured by it are provided with an alternative means to achieve their ends, but the alternative is more burdensome than the means which they prefer. *See Harman v. Forssenius*, 380 U.S. 528, 541 (1965).[1]

As this Court has stated, licensing qualifications must at least bear "a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). Thus, the issue here is whether it is rational to admit lawyers to the Eastern District bar if they live or work on the west side of the Pearl River (which divides Louisiana from southern Mississippi), but not on the east side of that river. In a related context, this Court has held that laws which give tax benefits to state residents, while denying them to out-of-staters, would violate the Equal Protection Clause even under a "minimum rationality" standard. *Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862 (1985); *Williams v. Vermont*, 105 S. Ct. 2465 (1985); *Metropolitan Life Ins. Co. v. Ward*, 105 S. Ct. 1676 (1985). Petitioner cited this line of authority to the court of appeals, but the majority did not mention it, even though the restriction here also "gives the 'home team' an advantage." *Metropolitan Life Ins. Co. v. Ward, supra*, 105 S. Ct. at 1682.

Apart from these constitutional considerations, review should be granted because the case presents questions of considerable importance regarding the practice of law and the administration of justice in the federal district courts. Lawyers, no less than the

[1] The majority's observation that *pro hac vice* admission is granted in the Eastern District "as a matter of course" (App.7a) hardly supports its conclusion that the local rules are rationally related to their goal. If *pro hac vice* admission is routine in the Eastern District, yet these practitioners are causing the problems described at trial, then the appropriate way to deal with the situation is to tighten up *pro hac vice* rules and not, as the dissent noted (App. 17a), to exclude out-of-staters who have taken and passed the Louisiana state bar examination and who are seeking *general* admission to the Eastern District bar in order to practice there regularly.

population generally, have become more mobile in recent years, and attorneys often find it desirable, if not necessary, to practice regularly in different districts and in different states, particularly when they live near a state line, as petitioner does. Moreover, the growing number and complexity of federal laws, and the increasing number of federally-protected rights, have led to greater specialization in the bar and a greater demand for specialized legal services irrespective of state boundaries.

Chesterfield Smith, a former president of the American Bar Association, has commented on the growth of interstate practice and stated in the context of state licensing that: "It would be to the direct benefit of both the public and the legal profession for every state to allow qualified and experienced lawyers from other states, under proper regulation and registration, to practice law anywhere in the United States." Smith, *Time for a National Practice of Law Act*, 64 A.B.A.J. 557, 558 (1978).

From a client's standpoint, there are numerous situations where having out-of-state counsel is desirable. For example, a client's regular counsel may not live or have an office in the forum state, and the client may wish to be represented by its regular lawyer, who is familiar with its business. A client may also need specialized legal advice that is not readily available in the forum state, or the client's case may be an unpopular one that local attorneys are reluctant to handle. *See Spanos v. Skouras Theatres Corp.*, 364 F.2d 168, 171 (2d Cir.)(*en banc*), *cert. denied*, 385 U.S. 987 (1966).

We in no way question the right of a federal district court to adopt rules designed to assure the competence and integrity of its bar. In the wake of *Piper*, however, as well as the dramatic growth of interstate practice, it is important for this Court to rule on the issue of whether a district court may adopt rules which limit admission to its bar to those lawyers who live or practice in the state where that court sits. If allowed to stand, the decision below will have an impact far beyond the Eastern District of Louisiana. As the court of appeals noted, there are 24 federal district courts (in ten federal circuits) which require members of their bar to have an in-state residence, office or both (App. 7a

n.7). Thus, future litigation seems inevitable, and it is doubtful that subsequent cases will present the pertinent legal issues more clearly than this one.

Nor does the 1985 amendment to Rule 83 of the Federal Rules of Civil Procedure, which requires the judicial council in each circuit to examine the local rules of district courts within that circuit, alter the need for this Court's review. If anything, the existence of this review process underscores the value of granting review at this time, in order to provide guidance to the lower courts as to what sort of rules are permissible. This is particularly true because it is unclear whether local restrictions on out-of-state lawyers will be retained or abolished. The point is illustrated by the changes that several district courts have made to their bar admission rules since the decision below (App. 7a n.7). The Southern District of Alabama recently adopted a rule, bringing it into line with the Middle and Northern Districts of Alabama, which requires members of its bar to live or practice regularly in Alabama, and the District of South Dakota has adopted a similar requirement. On the other hand, the Districts of Nevada and South Carolina dropped their rules requiring an in-state residence or office. *See* Callaghan's Federal Local Court Rules (revised through Release No. 74, August 1986). The uncertainty and disparate approaches taken on this subject also make this case worthy of review, as it would enable the Court to exercise its supervisory authority and provide much needed direction to the lower federal courts.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Cornish F. Hitchcock
(Counsel of record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W. Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

Of counsel:
Gary L. Roberts
Roberts and Clark
P.O. Box 237
Pascagoula, Miss. 39567
(601) 762-7104

September 1986

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3706

DAVID C. FRAZIER, Plaintiff-Appellant,

versus

HONORABLE FREDERICK J. R. HEEBE, ET AL., Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(April 24, 1986)

Before GOLDBERG, POLITZ, and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:

We are asked to review the rules regulating the admission of lawyers to the bar of the Eastern District of Louisiana. David C. Frazier appeals a judgment denying his petition for admission to the bar of that court. We affirm.

Background

Frazier, a member in good standing of the bars of Louisiana[1] and Mississippi, resides and has his law office in Pascagoula, Mississippi. He is admitted to practice before the United States District Court for the Southern District of Mississippi, the United States Court of Appeals for the Eleventh Circuit, and this court. In April 1982, Frazier applied for admission to the bar of

[1] The fact that Frazier is admitted to practice in Louisiana distinguishes this case from *Matter of Roberts*, 682 F.2d 105 (3d Cir. 1982).

the Eastern District, candidly noting in his cover letter that he neither resided nor maintained an office in Louisiana as required by Rule 21.2 of the Eastern District's local rules.[2] Frazier's application was denied solely because of this fact.[3]

Frazier sought a writ of prohibition from this court. We remanded the case for entry of an appealable judgment and ordered that the petition for extraordinary relief be carried with the case. *In re Frazier*, No. 83-3015, unpublished order (Feb. 14, 1983). On remand, Frazier filed a complaint alleging that Eastern District Rules 21.2 and 21.3.1[4] were unconstitutional both on their face and as applied, being in contravention of the commerce clause, the full faith and credit clause, the privileges and immunities clause of Article IV, the first amendment, and the equal protection component of the fifth amendment due process clause. The case was tried to Senior District Judge Edwin F. Hunter of the Western District of Louisiana, sitting by special designation. After a bench trial, Judge Hunter denied Frazier's petition for extraordinary relief and dismissed his suit. The reasons and reasoning assigned are comprehensive and scholarly. *Matter of Frazier*, 594 F.Supp. 1173 (E.D.La. 1984).

[2] Rule 21.2 of the local rules of the Eastern District provides:

> Any member in good standing of the bar of the Supreme Court of Louisiana who resides or maintains an office for the practice of law in the State of Louisiana is eligible for admission to the bar of this court.

[3] There is no dispute that Frazier meets all of the other requirements for admission in the Eastern District.

[4] Rule 21.3.1 of the local rules of the Eastern District, promulgated after Frazier had sought a writ of prohibition, enforces the goals of Rule 21.2. Rule 21.3.1 provides:

> In order to continue as a member of the bar of this Court, an attorney must continuously and without interruption reside or maintain an office for the practice of law in the State of Louisiana.
>
> An attorney admitted to practice before this Court, but who does not continuously qualify as set out herein, shall notify the Court within 30 days following termination of his qualifications that he desires to withdraw from the practice in this Court or that he desires a hearing to show cause why he should be permitted to continue to practice, though not qualified under the residence or office requirements of the rules.
>
> An attorney who is not qualified to practice before this Court on the effective date of this rule (as amended), having previously failed to maintain the residence or office requirements of the rule, shall be allowed 90 days within which to notify the Court of his election to withdraw from practice in this Court or to request a hearing as described above.
>
> At the time an attorney files the annual statement pursuant to the Rules of Disciplinary Enforcement of this Court, if the attorney has changed his residence or office address since the time of filing the previous annual statement, he shall certify that he is still qualified to practice before this Court pursuant to the requirements set out herein.

On appeal, Frazier urges only the equal protection and privileges and immunities claims. If we find the challenged rules constitutional, he alternatively asks that we exercise our supervisory jurisdiction over the district courts of this circuit and order his admission.

Analysis

Frazier's constitutional attack is dual: the challenged rules abrogate his privileges and immunities as a citizen, and they violate the equal protection clause.

Privileges and Immunities

The privileges and immunities clause, Art. IV, § 2, cl. 1, limits the powers of a state to accord the fundamental rights of a citizen of another state a treatment different than that given its own citizens. *See, e.g., Supreme Court of New Hampshire v. Piper*, 84 L.Ed.2d 205 (1985); *Toomer v. Witsell*, 334 U.S. 385 (1948). This clause does not apply to the federal government and its officers.

Frazier maintains that in the interest of promoting interstate harmony the clause ought to be made applicable through the due process clause of the fifth amendment to rules adopted by local federal courts. We are not persuaded.

Federal judges are empowered to promulgate local rules of court, 28 U.S.C. §§ 1654 & 2071; Fed.R.Civ.P. 83; *United States v. Hvass*, 355 U.S. 570 (1958), including rules respecting the admission of lawyers to practice before the court. *E.g., Brown v. McGarr*, 774 F.2d 777 (7th Cir. 1985); *Matter of Roberts*, 682 F.2d 105 (3d Cir. 1982); *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968). By analogy to the commerce clause, which the privileges and immunities clause closely resembles, *see, e.g.*,

Tribe, *American Constitutional Law* § 6-33 at 411-12 n.19 (1978); Sunstein, *Naked Preferences and the Constitution*, 84 Colum.L.Rev. 1689, 1710 (1984); *see generally* Varat, *State "Citizenship" and Interstate Equality*, 48 U.Chi.L.Rev. 487 (1981), pursuant to a specific grant of authority by Congress federal officers may adopt policies and rules which discriminate against citizens of some states, and benefit citizens of others. Indeed, this distributive and allocative function between the states is the essence of the federal government. Frazier's suggested distinction between "local" and "national" federal officers misperceives the basis for federal authority.

Many federal officers are "local" to the extent of geographical restraints on authority. The essence of the federal office, however, is its exercise on behalf of the entire nation, even though the authority is limited to a "local" area. The rules Frazier challenges were adopted pursuant to a congressional grant of authority. Frazier is a citizen of the relevant political community, the United States of America, with representation in its legislative body. He is not a powerless outsider in need of the protection of the privileges and immunities clause, and that clause provides him with neither a shield nor a lance.

Equal Protection

Frazier's more significant constitutional challenge advances under the aegis of the equal protection component of the due process clause of the fifth amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). As with most equal protection assessments, the court's first determination is the applicable level of scrutiny. Frazier urges that we apply either strict scrutiny or intermediate-level scrutiny in our constitutional balancing. We find neither appropriate.

When a law disadvantages a suspect class or impinges on a fundamental right, we will examine that law through the magnifying glass of strict scrutiny. Frazier invokes both predicates. The first is manifestly inapplicable; Frazier is not a member of a suspect class. His assertion that his lack of political power as an

out-of-state resident is akin to that of aliens or racial and national minorities, recognized suspect classes, is not persuasive. As a citizen, insofar as federal actions are concerned he is not an outsider lacking political power, as that concept is understood in the equal protection analysis. *See generally* Sunstein, *supra.* As to the second factor, a right is not fundamental unless it is "explicitly or implicitly guaranteed by the Constitution." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33 (1973).[5] We find no fundamental right implicated by the admission rules of the Eastern District. *See Matter of Roberts*, 682 F.2d 105 (3d Cir. 1982). The rubrics of strict scrutiny have no application in our constitutional testing of the subject rules.

Nor does the application of intermediate-level scrutiny. *See City of Cleburne v. Cleburne Living Center, Inc.*, 87 L.Ed.2d 313 (1985). Frazier is not burdened by an immutable trait and is not a member of a group traditionally subject to mistreatment, *Plyler v. Doe*, 457 U.S. 202 (1982). We do not find intermediate-level scrutiny applicable.

Having ruled out the strict and intermediate levels, there remains only the inquiry whether the rules are rationally related to a legitimate governmental purpose, the least demanding of the three standards. *But see Cleburne*, 87 L.Ed.2d at 327 (Stevens, J., concurring); *Plyler*, 457 U.S. at 230 (Marshall, J., concurring); Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 Sup.Ct.Rev. 167. Typically the "law" under examination will pass constitutional muster unless it creates a classification "whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *See Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973)." *Cleburne*, 87 L.Ed.2d at 324.

---

[5] For a discussion of the difference between fundamental rights under the privileges and immunities clause and those rights under the equal protection clause, *see* Varat, *supra*, 48 U.Chi.L.Rev. at 513-15; Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 Ga.L.Rev. 77, 89 n.62 (1982) (questioning validity of the distinction).

The stated and implicit governmental purpose served by the challenged rules is legitimate: the rules seek to foster the efficient and effective administration of justice. We must ascertain whether the relationship of the rules to that purpose is so attenuated that the rules are not rationally related to the purpose they ostensibly serve.

A review of the regulatory scheme established by the rules is critical to a determination of their validity. Rule 21.2 imposes two requirements on lawyers who seek admission to the bar of the Eastern District: (1) they must be members in good standing of the Louisiana bar, and (2) they must either reside or maintain a law office in Louisiana. Rule 21.3.1 provides the vehicle for ongoing enforcement of Rule 21.2 for, as amended, it requires the members of the bar of the Eastern District to certify annually that they continue to meet its requirements.

These rules do not prohibit lawyers who are not admitted in the Eastern District from practicing before that court. Rule 21.5 governs admissions *pro hac vice*, permitting a "member in good standing of the bar of any [federal] court. . . or the highest court of any state" to be admitted on motion to participate in a particular case. The rule requires, however, that a lawyer admitted *pro hac vice* be associated with counsel who is a member of the bar of the Eastern District. The requirement that counsel admitted *pro hac vice* be affiliated with local counsel may be waived under Rule 21.6 if a party who is not a resident of the Eastern District "would suffer hardship by joinder of local counsel, and the obligations and duties of counsel in the particular litigation will be fulfilled."

Frazier urges that the Eastern District's regulatory scheme irrationally discriminates against members of the Louisiana bar who neither reside nor maintain an office in Louisiana, and thereby violates the fifth amendment's equal protection component. We are not convinced. We find the rules reasonably related to their intended purpose.

The evidence before the district court included the testimony of judges Morey L. Sear and Veronica D. Wicker, magistrates Ingard O. Johannesen and Michaelle Wynne, and clerk of court

Loretta Whyte, all of the Eastern District. Their testimony was of one voice: lawyers admitted *pro hac vice*, who neither reside nor maintain an office in Louisiana, fail to comply with the local rules and impede the efficient administration of justice more than members of the bar of the Eastern District. This criticism included non-resident members of the bar of Louisiana.

The experiences of the five witnesses in the functioning of the court in the Eastern District of Louisiana suggests that outside counsel frequently impose an additional burden on the efficient administration of a trial docket. Not being readily available, because of geographical separation from the court, is the principal difficulty noted.

We harbor no doubt that the rules are as overinclusive in lumping all non-residents together as they are underinclusive in lumping together all lawyers who reside or maintain offices in Louisiana.[6] On the basis of the evidence, however, we conclude that the judges of the Eastern District acted in a reasonable manner in drawing the distinction.[7] The record reflects no invidious, discriminatory or otherwise inappropriate basis for the rules.

Although Frazier may not be admitted to the bar of the Eastern District, he is not prohibited from practicing before that court. As the district court found, "applications for admissions *pro hac vice* are granted as a matter of course in the Eastern District" and "Frazier would not be denied admission on this

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[6] Any lawyer admitted to the bar of Louisiana who resides or has an office there meets this admissions requirement. As attested, the smooth and efficient handling of the business of the court, including quick responses to appearance demands, is at the core of these rules. The court is aware that lawyers living or residing in Shreveport, Monroe, Lake Charles, and Lafayette, all within Louisiana but outside the Eastern District, are at a greater distance from the court in New Orleans than Frazier. Indeed, there are attorneys living or residing within the Eastern District who are more distant from New Orleans than Frazier's home in Pascagoula, Mississippi.

[7] The latest available data reveals that 24 federal district courts have admission rules similar to those at issue here, requiring either a residence, office, or both: M.D.Ala., N.D.Ala., D.Colo., D.Idaho, S.D.Ill., D.Kan., E.D.La., M.D.La., D.Me., E.D.Mo., W.D.Mo., D.Nev., E.D.N.C., D.N.D., S.D.Ohio, E.D.Pa., M.D.Pa., W.D.Pa., D.R.I., D.S.C., D.Utah, E.D.Va., W.D.Va., N.D.W.Va. The numbers and geographical spread speak for themselves. In addition, several district courts which allow non-residents to become members of their bars require the association of local counsel.

basis if he complied with Rule 21.5." 594 F.Supp. at 1181. These findings are not challenged on appeal.[8] Frazier insists that permitting his admission *pro hac vice* is not sufficient to avoid his equal protection challenge because under Rule 21.5 one appearing *pro hac vice* must associate local counsel. *Cf. Piper*, 84 L.Ed.2d at 209 n.2. He claims that this association imposes a financial burden on the client, non-resident counsel, or both.

The requirement that local counsel be associated with an out-of-state lawyer appearing *pro hac vice* has been approved, albeit in *dicta*, by the Supreme Court, *Piper*, 84 L.Ed.2d at 215, and this court, *Sanders v. Russell*, 401 F.2d at 248. We find significant in this case the fact that Rule 21.6 allows the waiver of the local counsel requirement and, according to Judge Sear, this waiver is granted for "good cause," such as a showing of "hardship to the litigant."

We are persuaded that the regulatory scheme of the Eastern District bears sufficient rational relationship to that court's goal of an efficient administration of justice. We are further persuaded that, in reality, Frazier's ability to practice in the Eastern District is not inappropriately burdened by the rules.

Frazier next challenges the admission rules as applied to him. To succeed in this challenge he must show discriminatory application of the rules, *i.e.*, that some members of the Louisiana bar who neither reside nor maintain an office in Louisiana have been admitted to the bar of the Eastern District. Frazier does not so contend; indeed, the evidence reflects no basis upon which such a contention could be made.

Supervisory Power

Finally Frazier earnestly asks that we exercise our supervisory jurisdiction and either invalidate the rules or order him

[8] Indeed, in this circuit "[a]n applicant for admission *pro hac vice* who is a member in good standing of a state bar may not be denied the privilege to appear except 'on a showing that in any legal matter, whether before the particular district court or in another jurisdiction, he has been guilty of unethical conduct of such nature as to justify disbarment of a lawyer admitted generally to the bar of the court.'" *In re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975), *quoting Sanders v. Russell*, 401 F.2d at 247-48.

admitted. Typically we do not consider issues not first presented to the district court. The nature of this request, however, involving our supervisory jurisdiction over the courts and the bar, validates our review. Having considered the matter, we decline to exercise our supervisory authority. *Cf. In re Evans; Sanders.*

The exercise of our supervisory power, at this time, would be inappropriate. The Fifth Circuit Judicial Council is currently reviewing the local rules of the nine district courts within the circuit.[9] Pursuant to the recently amended Fed.R.Civ.P. 83, the judicial council of each circuit is to examine all local rules to determine, in part, whether they "promote inter-district uniformity." Notes of Advisory Committee on the 1985 amendments to Rule 83. That examination is underway in this circuit. Simultaneously, a separate effort to harmonize the rules of Louisiana's three districts is in progress. We are reluctant to short-circuit or hamper those efforts in any way by precipitous action, particularly where no harm to Frazier has been demonstrated. We would merely note in passing, and without indicating any view on the merits, that in this circuit, only Middle Louisiana has a rule similar to those here challenged.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

[9] The judicial council of the Fifth Circuit is composed of all circuit judges in active service and nine district judges, one from each district.

GOLDBERG, Circuit Judge, dissenting:

I dissent because I do not believe that the challenged residency-or-office requirement can withstand even the most deferential judicial review.

The majority correctly notes that the challenged rules are both overinclusive and underinclusive. *See* majority opinion, *supra*, at [7a]. General rules tend to be imprecise. The question in deferential equal protection analysis is *how* imprecise the challenged rules are or, as the majority puts it, whether the rules create "a classification 'whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.'" *Id.* at [5a](quoting *City of Cleburne v. Cleburne Living Center*, 87 L. Ed. 2d 313, 324 (1985)).[1] The Supreme Court has described the legal standard applicable in deferential equal protection analysis as follows:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 64 L. Ed. 989, 990, 40 S. Ct. 560 (1920).

Reed v. Reed, 404 U.S. 71, 76 (1971) (applying rationality review).[2] Upon a review of the record in this case I conclude that the challenged rules are indeed unreasonable and arbitrary.

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[1] *Cf.* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949) (sustaining a classification that is both overinclusive and underinclusive "requires both the finding of sufficient emergency to justify the imposition of a burden upon a larger class than is believed tainted with the Mischief and the establishment of 'fair reasons' for failure to extend the operation of the law to a wider class").

[2] *See Matter of Frazier*, 594 F. Supp. 1173, 1180 (E.D. La. 1984):

> The basic issue before the Court is whether this disparate treatment between resident and nonresident members of the Louisiana bar is supported by a sufficiently weighty governmental purpose and whether the means chosen in Rule 21.2 are sufficiently related to that end.

Cf. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957) ("A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.").

According to the majority, the stated and implicit goal of the residency-or-office rules is "to foster the efficient and effective administration of justice." Majority opinion, *supra*, at [6a]; *see also Matter of Frazier*, 594 F. Supp. at 1183. It cannot be enough for these purposes that particular administrators or bureaucrats "like" the challenged rules or think that they are a good idea since they have always been the rules. Yet an examination of the trial testimony reveals that this is essentially the justification that has been offered in support of these rules.

The defendants in this case put on five witnesses at trial: the clerk of the Eastern District Court, two magistrates from the Eastern District, and two judges from the Eastern District. As might be expected, all five witnesses made sweeping, conclusory declarations to the effect that their residency-or-office rules were a reasonable means of furthering the legitimate governmental goal of efficient and orderly administration of justice. *See, e.g.*, Tr. at 216, 233, 246, 270, 291. Beyond these self-serving conclusions of law, however, several interesting themes emerge from a review of the testimony: (1) the local rules are, as it were, sacrosanct, and any departure from them would lead swiftly and inevitably to ruinous chaos and certain disaster; (2) non-resident lawyers and other outsiders (the "out-of-staters") have a bad attitude in that they show insufficient interest in or respect for the local rules; (3) the "out-of-staters" are the main cause of trouble in the Eastern District.

Clerk Whyte testified that "Lawyers in Louisiana give us fewer problems than lawyers outside Louisiana. And to tell you the truth, I wondered why myself." Tr. at 162. According to Whyte,

> Also, they are—again, not universally, but generally more often, I will say more often less responsive. It is not as easy to get them to return a telephone call. It's more difficult to get them to return a telephone call, and generally to comply with the rule when they have been spoken to.

Id. at 156.

Magistrate Johannesen elaborated on the defects of out-of-state lawyers as follows:

> Well, the problem I've encountered with the out-of-state lawyers are that they come into a case, then I tell them to

go get the rules and read the rules and follow the rules, which most of them won't do. . . .

. . . .

They drop out of the case without notifying the court. They won't file a motion to withdraw like the rule requires, and they just create a lot of problems.

. . . .

. . . .[T]he out-of-state lawyer. . .just wants more than what he should get. And most of them, we just don't get the courtesies from them that we should get from a lawyer.

Id. at 178-80. Magistrate Wynne related similar experiences with out-of-state lawyers:

Well, generally they've been bad experiences. We have a lot of trouble controlling out-of-state lawyers. Generally they are not familiar with our local rules, the pleadings many times do not conform with the manner of pleading that's acceptable in the Eastern District of Louisiana. I've had difficulties in certain situations.

Id. at 201. As examples of these difficulties Magistrate Wynne mentioned the following:

Well, say you represent a client, and just for an instance, instead of filing under our rules and proper notice pleading, you get an improper pleading. . . .Also, they improperly send it to me. This happens all the time, and I read the motion—they call it a rule—and I look at it and say, "Well, gee, this person ought to have this motion heard, but this lawyer has done it in an improper form." Now, what do you want me to do, sanction that lawyer? Call him up and tell him, "I'm going to hear your motion, but you are going to pay $200 to the court?" What do I do? I call him up, and say, "Why can't you follow our local rules?"

Id. at 221-22.

We've had a lot of problem with the local rules about filing things. I've had out-of-town counsel and out-of-state counsel mail pleadings to me, "Dear Magistrate Wynne, Enclosed please find this motion." I'm not the proper per-

son to receive those. The clerk of court is. And that has caused problems because then I will give it to the clerk of court. Please file this document, et cetera, and maybe they will need an expedited hearing, but they haven't complied with our local rules. . . .

Id. at 203. According to Magistrate Wynne, many of these problems could have been avoided if the attorney had been in closer proximity:

Q. In closer proximity. How close?

A. If he could have gotten, if he could have come without—or would have willingly come to our courthouse within an hour of anything you needed, or two hours.

. . . .

Q. Well, that's true, though, whether he's in Biloxi [Mississippi] or whether he is in Lake Charles [Louisiana]; is it not?

A. I would presume so, but I will tell you in all honesty, and I am under oath, I have not had problems with lawyers that practice in the Western District of Louisiana. They don't give the Eastern District any trouble.

Q. You do recognize that's about twice as far?

A. I know sir. I don't know why it is. . .

Id. at 226.

Finally, Judges Wicker and Sear testified to the intractable problems presented by out-of-state lawyers. Judge Wicker stated that

With our docket in this district, you cannot be a watchdog or a policeman on every attorney that comes into this court. The only resource that you have is to have control over the attorneys that appear. And if they are from out-of-state, you lose that control, and it can cause havoc with our docket.

Id. at 246.[3] Judge Sear summarized his experience with out-of-state attorneys as follows:

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[3] *Cf. id.* at 186 (testimony of Magistrate Johannesen): "I think there would be chaos if we didn't have the [residency-or-office] rule."

> I find that lawyers who come from out-of-state are more interested in the obligations that they have to the courts before [which] they regularly practice than they do for our court. They have a greater respect for them, perhaps, but more than that, they focus their attention on those matters to the neglect of ours. . .

Id. at 261.[4]

> I think, Mr. Sessions, that most lawyers that engage in practice in this district follow our local rules. I know those that practice in my court do. And they attempt conscientiously to follow those rules, and lawyers from out-of-state do not. . .

Id. at 272.

The testimony excerpted here is neither extraordinary or inexplicable. Insularity and provincialism are not peculiar to the Eastern District of Louisiana but form part of a widespread, basic socio-cultural pattern.[5] This explains why, for example, most people cheer for the "home team," no matter how bad it is. Similarly, in our vocabulary the outsider is one who behaves in "outlandish" ways.[6] Nevertheless, when basic protections guaranteed by the Constitution are at stake, socio-cultural explanations of this sort cannot suffice as justifications. The equal protection provisions, and our federalist scheme generally, impose a measure of cosmopolitanism and uniformity in areas where local interests would otherwise take their own course. This is particularly so in light of the Supreme Court's recent proposed amendment to Fed. R. Civ. P. 83. *See* Order of April 29, 1985. According to the Advisory Committee Note on this amendment, "The expectation is that the judicial council will examine all local rules, including those currently in effect, with

[4] *Cf. id.* at 213 (testimony of Magistrate Wynne): "I find out-of-state counsel. . . are primarily interested in the development of the law of the state in which they reside. And they become deficient in Louisiana law."

[5] *See, e.g.*, T.W. Adorno, E. Frenkel-Brunswik, D. Levinson & R.N. Sanford, *The Authoritarian Personality* (1964); G. Allport, *The Nature of Prejudice* (1954); G. Myrdal, *An American Dilemma* (1944); R.S. Lynd & H.M. Lynd, *Middletown* (1929).

[6] *See Oxford English Dictionary* 2023 (Compact ed. 1971).

an eye toward determining whether they are valid and consistent with the Federal Rules, promote inter-district uniformity and efficiency, and do not undermine the basic objectives of the Federal Rules." Fed. R. Civ. P. 83, Notes of Advisory Committee on Rules (West 1985).

Even if the above considerations did not apply, there are still further weighty and compelling reasons that the appellees' position in this case is untenable. Once Frazier had made out a prima facie case of an equal protection violation, appellees could have responded in either of two ways: (1) They could have defended their rules, as applied to Frazier, on grounds that he did not qualify under some uncontested provisions of the rules (*e.g.*, that he was not in fact a member in good standing of the Louisiana bar); (2) or they could have made a showing that these contested rules, even if they do cause an insupportable hardship as applied to Frazier, can nevertheless be justified as constitutional in their general application. Appellees did not even attempt to rebut Frazier by the first route; and their showing on the second theory is patently insufficient as well.

A general defense of the residency-or-office rules challenged here would have to take something like the following form: Members of the Louisiana bar who do not reside or maintain an office in Louisiana cause, *on the average*, more "problems" in the Eastern District of Louisiana than those who do.[7] Appellees

[7] *See* P. Brest & S. Levinson, *Processes of Constitutional Decisionmaking* 553-54 (2d ed. 1983):

> Let X and Y be two individuals or things similarly situated in all respects except as described below. The purpose and effect of the regulation are to reduce or eliminate a "mischief." It is not irrational to impose the regulation on X but not on Y if:
>
> 1. Application of the regulation to X reduces the total amount of mischief more than would its application to Y; or
> 2. X causes a greater amount of mischief than Y causes; or
> 3. Y's cost of complying with the regulation is greater than X's; or
> 4. exempting Y from the burden of the regulation will serve an ancillary objective; or
> 5. a. X possesses trait T, and
>
> b. on the average, persons or objects possessing T are situated with respect to persons not possessing T as X (in 1 through 4) is situated with respect to Y; and
>
> c. employing T as a classifying trait is more efficient than employing a narrower, more individualized trait.

have not made a legally probative showing on any such theory. Instead, the evidence introduced at trial was limited almost exclusively to experiences with *pro hac vice* practitioners—i.e., attorneys practicing in Louisiana who are *not* members of the Louisiana bar but who have retained local (Louisiana) counsel. At trial the distinction between members and non-members of the Louisiana bar was simply not observed:

> A. Our office deals with attorneys primarily in the filing of papers, and we have found, not universally, certainly, but generally, and on the average, that attorneys located out-of-state submit papers for filing which do not comply with the local rules more frequently than do local attorneys.
>
> Q. Would that apply to out-of-state lawyers who may or may not have been admitted generally or specifically for one case to practice before this court?
>
> A. That would apply to out-of-state attorneys generally.
>
> Q. Across the board, as it were?
>
> A. Yes.

Tr. at 153 (testimony of Clerk Whyte). On the one occasion that this distinction was brought up (by the court), it emerged that the witness could report on only *two* non-resident members of the Louisiana bar:

> Q. . . .Now, do attorneys in that category, who have been admitted to the bar of Louisiana, but who have neither a residence nor a law office in Louisiana, present any problems, if you have had experience with any people like that from out-of-state?
>
> . . . .
>
> A. Well. . .they weren't all that familiar, or they didn't care about our local rules, or they would confuse our local rules and our way of practice, and pleading with other jurisdictions. I find that. I find just out-of-state lawyers in general——
>
> THE COURT: Do you understand what Mr. Sessions is limiting his question to is attorneys who have passed the Louisiana Bar Exams, and been admitted to the bar, but didn't live in Louisiana?

> THE WITNESS: Yes, sir. I'm thinking of one in particular that practices in Biloxi, Mississippi, nor Mr. Frazier.
>
> THE COURT: I wonder how many lawyers, ma'am, you would know in that category?
>
> THE WITNESS: Two.
>
> THE COURT: Two?
>
> THE WITNESS: Two to my recollection. One practicing in Mississippi, and one is in Texas. . . .

Id. at 214-215 (testimony of Magistrate Wynne). Appellees have advanced no reasons to suppose that out-of-state lawyers in general are a relevant comparison group for purposes of this case. And, indeed, there is every reason to think that they are not: Lawyers who seek *general* admission to the Eastern District bar thereby indicate an interest in developing an ongoing and regular practice in the District; they will have passed the Louisiana State bar examination—which is no mean feat, given the unique nature of Louisiana law; and they will have to pay annual dues of $40 for the first three years and $100 per year thereafter. *See* Appellant's Brief at 19-21; Appellant's Reply Brief at 3-4, 9-10. In short, they will have invested considerably more time and money to practice in the Eastern District on a continuing basis than those admitted on a *pro hac vice* basis. It is thus unreasonable and unfair to assume—without argument, evidence, or justification—that the experience with occasional *pro hac vice* practitioners is relevant to Mr. Frazier's application for *general* admission to the Eastern District bar.[8]

Even if appellees had limited their testimony to the proper comparison group, that testimony would still have to be dismissed as essentially worthless. Appellees have wholly failed to put forward any objective, systematic evidence in their defense:

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[8] It may be possible to make such a connection; but it is up to the appellees—not this court—to make it. *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., separate opinion) ("The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis."); *cf. Supreme Court of New Hampshire v. Piper*, 105 S. Ct. 1272, 1278-80 (1985) (considering and rejecting arguments that nonresident State bar members would be less likely: 1) to become, and remain, familiar with local rules and procedures; 2) to behave ethically; 3) to be available for court proceedings; and 4) to do *pro bono* and other volunteer work in the State).

Q. Now, you testified earlier about, as I understood, that you got filings, various documents for filing that were deficient more often from out-of-state lawyers than from in-state lawyers; is that correct?

A. Uh-huh.

Q. Now, you conducted a personal study of that, have you?

A. If you mean by a study did we count them, no. . . .

Tr. at 161 (testimony of Clerk Whyte).

Q. You said ninety-eight percent of the out-of-state lawyers cause you those types of problems?

A. That's right.

Q. Now, what studies have you done to that end?

A. Well, basically I just know what my docket is, and I know what lawyers I have, and what the problems I've had with them, and out-of-state lawyers just constantly give me the problems.

Q. Is the answer that you haven't done any studies? Have you got any empirical evidence or data?

A. Statistics?

Q. Yes.

A. No, I don't have any basic statistics.

Id. at 192 (testimony of Magistrate Johannesen).

Q. Even Louisiana lawyers who do that, has it been your experience that they've been members of the bar of this court, or are just trying to practice without qualifying?

A. I don't know sir. I don't know.

Q. You didn't keep any diary, keep any statistics of those kinds of cases, did you?

A. No.

Id. at 205 (testimony of Magistrate Wynne).

Q. You didn't keep a dairy or any compilation of statistics or day-by-day recordation of problems you had with non-resident attorneys while you were a magistrate, did you?

A. No.

Id. at 232 (testimony of Judge Wicker).

I do not make a fetish of statistics. But generalized, visceral reactions and vague, anecdotal reminiscences of this sort do not rise to the level of legally probative evidence; they cannot supplant the need for hard, empirical data when the Constitution's guarantee of the equal protection of the laws is at stake.[9] Thus, even if appellees' evidence had been relevant—which, as I have explained above, it is not—I would hold that it is insufficient as a matter of law.

[9] *Cf. Castaneda v. Partida*, 430 U.S. 482 (1977) (establishing standards of statistical proof); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977) (same).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3076

DAVID C. FRAZIER,

Plaintiff-Appellant

versus

HONORABLE FREDERICK J. R. HEEBE,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING EN BANC

(Opinion April 24, 1986, 5 Cir., 198__, ____ ____F.2d____)
(June 25, 1986)

Before GOLDBERG, POLITZ and JOLLY, Circuit Judges

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active

service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Bank is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3706

D.C. Docket No. MISC. No. 873 EFH

DAVID C. FRAZIER,
Plaintiff-Appellant,

versus

HONORABLE FREDERICK J. HEEBE, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

Before GOLDBERG, POLITZ, and JOLLY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

APRIL 24, 1986

GOLDBERG, Circuit Judge, dissenting.
ISSUED AS MANDATE: JULY 7, 1986

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF DAVID C. FRAZIER — MISC. NO. 873 (EFH, JR.)

OPINION

In this suit, David Frazier challenges the constitutionality of the Local Rules for the Eastern District of Louisiana that pertain to the admission of nonresident attorneys to the Court's Bar. Frazier commenced this action by filing a petition for a writ of prohibition and other relief with the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit remanded the cause to the District Court for the Eastern District of Louisiana for appropriate proceedings and entry of an appealable judgment. The appellate court noted that the petitions for extraordinary relief were carried with the cause on remand. After all of the active and senior judges of the Eastern District recused themselves, the matter was assigned to this judge, a senior judge of the Western District of Louisiana. A preliminary motion for summary judgment and a motion to dismiss for want of jurisdiction were taken under advisement for resolution after a trial on the merits and the action was tried to the Court, sitting without a jury, on August 10, 1984. This narrative opinion will serve as the findings of fact and conclusions of law required by Federal Rule of Civil Procedure 52(a).

Background

This action arises out of a simple set of facts, none of which are disputed by the parties. David Frazier resides in Pascagoula, Mississippi and practices law with a firm located in that same city. Pascagoula is about 110 miles from New Orleans, where the Eastern District sits. Frazier is licensed to practice law in both Mississippi and Louisiana. On or about April 27, 1982, Frazier applied for general admission to the bar of the Eastern

District, attaching all of the materials required by Local Rule 21.3. The matter was submitted to the Court sitting *en banc* and the Court ruled that Frazier was ineligible for general admission to the Eastern District Bar. The Clerk notified Frazier of this decision in a letter dated September 30, 1982.

In denying Frazier's application, the Court found that Frazier could not satisfy the eligibility requirements of Local Rule 21.2. This rule provides as follows:

> 21.2 Eligibility
>
> Any member in good standing of the bar of the Supreme Court of Louisiana *who resides or maintains an office for the practice of law in the State of Louisiana* is eligible for admission to the bar of this court.

(emphasis added). As a nonresident member of the Louisiana state bar, Frazier can qualify for admission to the Eastern District bar only by moving to Louisiana or by opening a law office in Louisiana. In substantial effect, the Rule requires nonresident members of the Louisiana bar to open a law office in Louisiana in order to qualify for general admission to the Eastern District bar. Continuous and uninterrupted Louisiana residence or maintenance of a Louisiana law office is now a requirement for *continuing* eligibility in the Eastern District bar. *See Eastern District of Louisiana Local Rule* 21.3.1.

If a nonresident attorney cannot qualify for general admission to the Eastern District Bar, then he may practice before the Court only by way of an application for *pro hac vice* admission. The procedure for *pro hac vice* admission is set forth in Local Rule 21.5, which provides as follows:

> 21.5. Visiting Attorneys
>
> Any member in good standing of the bar of any court of the United States or of the highest court of any state, who is ineligible to become a member of the bar of this court, may, upon written motion of counsel of record who is a member of the bar of this court, by ex parte order, be permitted to appear and participate as co-counsel in a particular case.
>
> The motion must have attached to it a certificate of the presiding judge or clerk of the highest Court of the State, or

> Court of the United States, where he has been so admitted to practice, showing that the applicant attorney has been so admitted in such Court, and that he is in good standing therein.
>
> The applicant attorney shall state under oath whether any disciplinary proceedings or criminal charges have been instituted against him, and if so, full information about the proceedings or charges and the results thereof shall be disclosed.
>
> An attorney thus permitted to appear may participate in a particular action or proceeding in all respects, except that all documents requiring signature of counsel for a party may not be signed solely by such attorney, but must bear the signature also of local counsel with whom he is associated.
>
> Local counsel shall be responsible to the Court at all stages of the proceedings.
>
> Designation of the visiting attorney as "Trial Attorney", pursuant to Rule 2.3 herein shall not relieve the local counsel of the responsibilities imposed by this Rule.

The Court finds as a fact that David Frazier would not have been denied *pro hac vice* admission had he compiled with Rule 21.5.

Frazier challenges the eligibility requirements of Rule 21.2 as violative of the Commerce Clause, the Full Faith and Credit Clause, the guarantee of equal protection of the laws secured by the Due Process Clause of the Fifth Amendment, and the Privileges and Immunities Clause. Frazier also contends that limiting him to admission on a *pro hac vice* basis violates the protections of the First Amendment. The Court will consider each of these challenges in turn after addressing the defendants' objection to jurisdiction.

Jurisdiction

Counsel for the district judges concede that jurisdiction exists over this type of subject matter under 28 U.S.C. § 1651. Counsel urges, however, that the Court nonetheless lacks jurisdiction on the basis that Frazier has failed to raise a substantial federal question. A federal claim is jurisdictionally insubsantial only if it is obviously without merit or it is com-

pletely foreclosed by prior decisions of the Supreme Court. *See Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974). The test for dismissal on this basis is a rigorous one and ultimate dismissal on the merits is no test of jurisdiction. *See generally* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3564 (1975). Here, the Court does not find that Frazier's claims are obviously without merit or that they are completely foreclosed by prior Supreme Court decisions. Accordingly, the Court concludes that it has jurisdiction over the subject matter and will proceed to the merits of Frazier's claims.

Commerce Clause

Frazier contends that Rule 21.2 violates the Commerce Clause because it has "the chilling effect of discriminating against and thereby discouraging out-of-state attorneys from the general practice of law before the Bar of the Eastern District of Louisiana." Trial Brief for the Plaintiff, at 12. Frazier relies upon several cases recognizing constitutional restrictions on the power of states to prefer residents over nonresidents, such as *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (Alaska could not require preferential hiring of residents over nonresidents in oil or gas exploration and development agreements); *Piper v. Supreme Court of New Hampshire*, 539 F.Supp. 1064 (D. N.H. 1982), *aff'd by an equally divided court*,723 F.2d 110 (1st Cir. 1983) (en banc), *prob. juris. noted*, 466 U.S. 949 (1984) (New Hampshire could not require residency for admission to the state bar); *Stalland v. South Dakota Board of Bar Examiners*, 530 F.Supp. 155 (D. S.D. 1982) (similar); *Keenan v. Board of Law Examiners*, 317 F.Supp. 1350 (E.D. N.C. 1970) (the court struck down a twelve-month residency requirement for eligibility to take the North Carolina bar); *In re Jadd*, 391 Mass. 227, 461 N.E.2d 760 (1984). It must be noted at the outset that all of these cases are decided under either the Privileges and Immunities Clause or the Equal Protection Clause. The *Hicklin* Court and two circuit judges in *Piper* do intimate, however, that the Commerce Clause also limits a state's ability to prefer residents over nonresidents. *See Hicklin*, 437 U.S. at 531-34;

Piper, 723 F.2d at 113 (Bownes and Coffin, JJ.); *see also Service Machine & Shipbuilding Corp. v. Edwards*, 617 F.2d 70 (5th Cir. 1980) (a parish ordinance that required nonresident workers to obtain an identification card at a cost of ten dollars impermissibly burdened interstate commerce). Yet, even assuming that the Commerce Clause in its dormant state prohibits states from restricting admission of nonresident attorneys, it is far from clear that this particular clause places a similar restriction on the Congressionally-delegated rule-making authority of the lower federal courts.

The rule-making authority of the lower federal courts is limited only to the extent that Congress would be limited if that body itself exercised the rule-making power. Congress possesses the power to establish courts inferior to the Supreme Court and to make all laws necessary and proper for executing that power. *U.S. Const.*, art. I, § 8, cl. 9; *U.S. Const.* art. I, § 8, cl. 18. As part of the power to make necessary regulations in establishing a lower court system, Congress can prescribe rules for practice and procedure in those courts. Congress has not exercised this power directly, however, but has instead delegated the rule-making authority to the courts themselves. See 28 U.S.C. § 2071 (general delegation of rule-making authority); 28 U.S.C. § 1654 (specific delegation of authority to prescribe rules governing the appearance of counsel); *see also* F.R.C.P. 83 (authority for district courts to adopt local rules).[1] So long as the lower

[1] Frazier does not challenge the propriety of the basic delegation of rule-making authority to the lower courts. The Constitution does require Congress to lay down policies and establish standards when it delegates legislative power. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Yet these limits on the authority of Congress to delegate its legislative power are less stringent when the entity exercising the delegated authority itself possesses independent authority over the subject matter. *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975). Congress need not define the standards governing the delegation as narrowly as would be required in other situations. *See United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-22 (1936) (Congress need not lay down narrowly definite standards in delegating authority to a president to prohibit sales of arms and munitions to certain warring nations). In the instant case, the entities exercising the delegated authority to make court rules, the lower federal courts, themselves, possess independent authority over the subject matter, practice and procedure in those courts. Section 2071 states that the rules shall be "for the conduct of their business" and requires that the rules be consistent with Acts of Congress and the rules of practice and

courts do not exceed the authority delegated to them,[2] they can prescribe rules of practice to the same extent as could Congress if it exercised the power directly.

The Commerce Clause no more limits the authority of the Eastern District of Louisiana to prescribe local rules of practice than it would restrain Congress in exercising that power directly. The Commerce Clause is a *grant* of federal legislative power, not a restriction on that power. Frazier surely would not assert that the clause would invalidate federal legislation under another national power, such as the power to establish inferior courts and prescribe rules for their practice, merely because the legislation imposes a burden on interstate commerce. The Commerce Clause restricts *state* action where that action unduly burdens interstate commerce because of the encroachment on a power granted to the national government. *E.g., Piper*, 723 F.2d at 113. But when *national* legislative powers are exercised, either directly or by delegation, encroachment on federal power is not a concern and the clause can serve only to expand, rather than restrict, the permissible sphere of federal regulation. Accordingly, the Commerce Clause places no limitation upon the rule-making authority delegated by Congress to the Eastern District of Louisiana. The limitations on that power must be found in other provisions of the Constitution.

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procedure prescribed by the Supreme Court. In light of the independent authority of the courts over practice and procedure, these standards suffice to properly delegate the rule-making authority to the lower federal courts. *Cf. Sperry v. Florida*, 373 U.S. 379, 403 (1963)(35 U.S.C. § 31 contains sufficient standards to guide the Patent Office in admitting persons to practice before that body and is therefore a proper delegation of legislative authority).

[2] That a court might adopt a local rule that bears absolutely no relationship to "the conduct of [its] business" is of course conceivable. For example, a court might attempt to regulate the price of certain produce in interstate commerce. But, here, Frazier could not cogently argue that prescribing rules for admission to a district court's bar is other than in "the conduct of [its] business." Indeed, the exercise of this power is expressly authorized by 28 U.S.C. § 1654. Similarly, Frazier does not contend that Rule 21.2 is inconsistent with an Act of Congress or a rule prescribed by the Supreme Court. Thus, it is clear that the Eastern District was acting within the scope of the powers delegated to it when it adopted the rule.

Full Faith and Credit

As noted earlier, the Supreme Court of Louisiana has admitted Frazier to its bar and has decreed that he is qualified to practice in Louisiana courts. Frazier urges that the Eastern District improperly denied full faith and credit to this decree when it refused him admission to its own bar. Although federal courts are not bound by the Constitution to give full faith and credit to state court judgments, Congress has made the command of Article 4, section 1 of the Constitution applicable to federal courts by statute. *See* 28 U.S.C. § 1738. A decision of a court granting or denying admission to its bar is a judicial determination[3] and it is thus entitled to full faith and credit in a federal court. At issue is whether the Eastern District has improperly denied full faith and credit in the instant case.

The Court concludes that the Eastern District did not violate section 1738 when it denied Frazier admission to its bar. It is axiomatic that a state court decision is entitled to full faith and credit only to the extent that the state court had jurisdiction over the subject matter. *E.g., Halvey v. Halvey,* 330 U.S. 610, 614 (1947). A state's highest court has absolutely no jurisdiction over the subject matter of practice and procedure before the federal courts that sit in that state. Thus, a federal court does not violate the statutory command of full faith and credit when it denies admission to an attorney licensed by the state in which it sits. Moreover, the certificates of admission and of good standing issued to Frazier by the Supreme Court of Louisiana do not in fact purport to declare that Frazier is qualified to practice before the federal courts sitting in this state. The certificates state that Frazier is qualified to practice in the courts *of* this state, not that he is qualified to practice in all courts located *in* this state.

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[3] *See District of Columbia Court of Appeals v. Feldman*, 103 S.Ct. 1303, 1311-14 (1983) (jurisdiction case).

Fifth Amendment Equal Protection

Frazier's most pertinent challenge to Rule 21.2 lies under the equal protection component of the Due Process Clause of the fifth Amendment.[4] In evaluating this challenge, what the rule does and what it does not do must be kept in sharp focus. The rule does *not* bar nonresident attorneys who are licensed in Louisiana from general admission to the Eastern District bar. The rule *does* require such attorneys to establish an office in Louisiana as a prerequisite to their general admission. If the nonresident attorney does not open an office and thereby qualify for general admission to the district court's bar, then he can appear in a particular action only by satisfying the requirements for a *pro hac vice* appearance. *See* Eastern District of Louisiana Local Rule 21.5. The basic issue before the court is whether this disparate treatment between resident and nonresident members of the Louisiana bar is supported by a sufficiently weighty governmental purpose and whether the means chosen in Rule 21.2 are sufficiently related to that end.

If a rule disadvantages a "suspect class" or impinges upon the exercise of a "fundamental right," then it will be subject to strict scrutiny under equal protection review. *E.g., Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 195-96 (5th Cir. 1984). Frazier does not contend that nonresident attorneys are a suspect class, but he does urge that strict scrutiny should be applied here because Rule 21.2 impinges upon a fundamental right—that of practicing law. A right is "fundamental" for purposes of equal protection review only if the right asserted is explicitly or implicitly guaranteed by the Constitution. The societal significance or commercial importance of an activity does not determine whether the right to engage in that activity is a fundamental interest for equal protection purposes. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

[4] Frazier's additional reliance upon the Equal Protection Clause of the fourteenth amendment is clearly misplaced as that amendment does not limit federal governmental action. The analysis under fifth amendment and fourteenth amendment equal protection is basically the same, however, although the limitations imposed by equal protection principles on federal and state power are not always coextensive. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

This Court can find no support in the document for a constitutional right to practice law. The Constitution does limit the power of states to restrict bar admissions. Yet this has occurred in the past only where the restriction bore no rational connection to the purposes for selecting members to a bar,[5] where the restriction impinges upon another interest which is constitutionally protected, such as the right to associate,[6] or where a court concluded that the restrictions discriminated against nonresidents in a manner that violated the Privileges and Immunities Clause.[7] This Court can find no Supreme Court or federal appellate decision that establishes the right to practice law as protected directly under the Constitution without resort to some other constitutional guarantee, such as equal protection of the laws. Indeed, substantial authority supports the position that a right to practice law cannot be derived independently from the Constitution.[8] The Court therefore concludes that the

[5] *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

[6] *See Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971) (plurality opinion) (membership in a particular political organization is not a ground for denying admission to a state bar).

[7] *See Piper*, 723 F.2d at 112-18 (opinion of two judges of an equally divided court sitting *en banc*).

[8] The Supreme Court stated in *Leis v. Flynt*, 439 U.S. 438 (1979)(per curiam summary reversal):

> [There is no] basis for the argument that the interest in appearing *pro hac vice* has its source in federal law. . . . There is no right of federal origin that permits such lawyers to appear in state courts without meeting that State's bar admission requirements. This Court, on several occasions, has sustained state bar rules that excluded out-of-state counsel from practice altogether or on a case by case basis. . . . These decisions recognize that the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another.

439 U.S. at 443 (citations omitted). While it is true that Frazier has met the *State's* bar admission requirements, he remains an "out-of-state" lawyer as to the Eastern District's bar admission requirements. As such a lawyer does not have a right protected directly under the Constitution to appear even temporarily before the Court, Frazier's claim of a fundamental right to appear as a permanent member of the bar appears all the more tenuous. *See also Martin v. Walton*, 368 U.S. 25 (1961), *dismissing for want of a substantial federal question the appeal from* 187 Kan. 473, 357 P.2d 782 (1960)(members of the Kansas bar *who were residents* of Kansas could be required to associate local counsel

right to practice law is not a fundamental interest for purposes of equal protection review and it will not apply strict scrutiny on that basis.

Frazier also attempts to invoke strict scrutiny because of an alleged infringement of his constitutionally-protected right of interstate travel. There is some question at the outset as to whether a restriction that is based merely on residency and which does not impose a waiting period prior to receipt of state benefits impermissibly infringes upon the right to interstate travel. *Compare Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255 (1974) (the Court noted that decisions striking down durational residency requirements do not impair the validity of a mere requirement of residency to enjoy a state privilege) *with Zobel v. Williams*, 457 U.S. 55 (1982) (the Court noted that the Alaska statute involved did not impose any threshold waiting period but did not determine whether the law should be subjected to the higher level of scrutiny applied in the durational residency cases). What is clear, however, is that a restriction based on residency does not warrant strict scrutiny merely because it impinges to some extent on the right to travel. *Maricopa County*, 415 U.S. at 256. The requirement must constitute a "penalty" upon the exercise of the right of interstate travel before an underlying compelling state interest need be shown. 415 U.S. at 258. The Supreme Court has established that the denial of a basic necessity of life does constitute a penalty, but that tribunal has not further clarified the standards for determining when a penalty has been imposed. *See* 415 U.S at 259. The Supreme Court has expressly reserved the question of whether a requirement of residency to obtain permission to practice a profession constitutes a penalty. *See Shapiro v. Thompson*, 394 U.S. 618, n. 21 (1969).

The Court need not define the precise contours of the penalty analysis to determine that the requirement imposed in the instant case is not a penalty on the exercise of the right of interstate travel. The basic disability resulting from the failure to open a Louisiana office, the inability to practice before the Eastern District, can be overcome quite easily. Frazier does not contend that he would not be allowed to appear *pro hac vice* in any case he might have before the Eastern District by complying with Local Rule 21.5.[9] The Court finds as a fact that applications for admission *pro hac vice* are granted as a matter of course in the Eastern District and further finds that Frazier would not be denied admission on this basis if he complies with Rule 21.5. *See also United States v. Dinitz*, 538 F.2d 1214 (5th Cir. 1976) (en banc); *In re Evans*, 524 F.2d 1004 (5th Cir. 1975) (*Dinitz* and *Evans* both concern the scope of a trial judge's discretion in granting or denying applications for *pro hac vice* appearance). The impact of the restriction in Rule 21.2 is thus quite unlike the durational residency requirements invalidated in *Shapiro* and *Maricopa*. Here, Frazier is not "irretrievably foreclosed" from appearing before the Eastern District; he need only comply with certain additional procedures which serve quite legitimate interests in ensuring that counsel is locally available to the court and in assuring that the attorney has the requisite ethical integrity. *Cf. Sosna v. Iowa*, 419 U.S. 393, 406 (1975) (the one-year durational residency requirement for bringing a divorce action did not impermissibly impinge on the right of interstate travel because the party could ultimately attain access to the Iowa courts). Moreover, any hardship occasioned by the requirement that local counsel be associated can be relieved by obtaining a waiver of that requirement. *See Lefton v. City of Hattiesburg*, 333 F.2d 280, 285 (5th Cir. 1964); *Eastern District of Louisiana Local Rule* 21.6. The Court therefore concludes that Rule 21.2 does not impose a penalty upon the right of interstate travel and will not apply strict scrutiny on that basis.

There being no basis for strict scrutiny in this case, the question next arises as to whether an intermediate level of scrutiny

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if they regularly engaged in practice out of the state); *Kovrak v. Ginsburg*, 358 U.S. 52, 79 S.Ct. 95, 3 L.Ed.2d 46 (1958), *dismissing for want of a substantial federal question the appeal from* 392 Pa. 143, 139 A.2d 889.

[9] Under Rule 21.5, the visiting attorney must (1) attach a certificate of good standing, (2) state under oath whether any disciplinary or criminal charges have been instituted against him, and (3) associate local counsel.

should be applied. A classification must be tested under the intermediate scrutiny standard when the line drawn gives rise to recurring constitutional difficulties. *Plyler v. Doe*, 457 U.S. 202, 217 (1982); *Cleburne Living Center*, 716 F.2d at 196. The Supreme Court has observed that it employs this standard "[o]nly when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases." *Plyler*, 457 U.S. at 218 n. 16. If intermediate scrutiny is appropriate, then the classification must serve important governmental objectives and must be substantially related to the achievement of those objectives. *E.g., Cleburne Living Center*, 726 F.2d at 196.

Whether intermediate scrutiny should be applied in the instant case is not free from doubt. On the one hand, classifications pertaining to residency have given rise to constitutional difficulty. *Shapiro* and *Maricopa* invalidated durational residence requirements limiting access to vital governmental services. In *Hicklin v. Orbeck*, 437 U.S. 518 (1978), the Supreme Court struck down as violative of the Privileges and Immunities Clause an Alaskan requirement that residents must be hired in the oilfield before nonresidents. More recently, the Supreme Court held that another Alaska statute, one which allocated a state bonus according to length of residency, could not withstand even deferential review under the Equal Protection Clause. *See Zobel v. Williams*, 457 U.S. 55 (1982); *see also Service Machine & Shipbuilding Corp. v. Edwards*, 617 F.2d 70 (5th Cir. 1980) (the court held that a parish ordinance requiring nonresident workers to obtain an identification card at a cost of ten dollars impermissibly burdened interstate commerce).[10] Perhaps "concerns sufficiently absolute and enduring" can be ascertained from these decisions. Yet, on the other hand, the Supreme Court has repeatedly rejected in summary fashion constitutional challenges to state practice

[10] The Fifth Circuit did not address the merits of the non-resident workers' equal protection challenge and the case therefore has no direct relevance here.

regulations linked to residency.[11] These summary rejections provide strong support for the contention that regulation of the legal profession on lines drawn according to residency do not present recurring constitutional difficulties and that deferential scrutiny should therefore be applied.

The Court need not determine whether intermediate, as opposed to deferential, scrutiny should properly be applied in the instant case. The distinction between the two standards does not become a material one here because Rule 21.2 withstands the higher standard of review. That is, Rule 21.2 serves important governmental objectives and it adopts means that are substantially related to the achievement of those objectives.

Rule 21.2 serves at least one important governmental objective, the efficient administration of justice. Frazier seeks to characterize this interest as a concern merely for administrative convenience. Yet more is involved in the efficient operation of a court system than the mere convenience of judges and court personnel. Delays in litigation delay, and sometimes completely deny, justice to one or more of the parties. With delay comes additional expense for all of the parties. Moreover, all who seek the court's services must suffer when the smooth flow of justice is obstructed. In a society such as ours, which places a high

[11] *See Leis v. Flynt*, 439 U.S. 438 (1979) (summary per curiam reversal of due process challenge to denial of application for a *pro hac vice* appearance); *Wilson v. Wilson*, 430 U.S. 925 (1977) *summarily aff'g* 416 F.Supp. 984 (D. Ore. 1976) (the three-judge district court held that the state could require a bar applicant to express an intent to be a resident of the state at the time of admission without penalizing the right of interstate travel and without contravening equal protection interests); *Norfolk & Western R.Co. v. Beatty*, 423 U.S. 1009 (1975), *summarily aff'g* 400 F.Supp. 234 (S.D. Ill.) (state restrictions on participation by out-of-state counsel); *Brown v. Supreme Court of Virginia*, 414 U.S. 1034 (1973), *summarily aff'g* 359 F.Supp. 549 (E.D.Va.) (the three-judge district court, one judge dissenting, rejected an equal protection challenge to a Virginia requirement that attorneys admitted by reciprocity without examination must become Virginia residents); *Suffling v. Bondurant*, 409 U.S. 1020 (1972), *summarily aff'g* 339 F.Supp. 257 (D. N.M.) (the three-judge court, one judge dissenting, rejected an equal protection challenge to a rule requiring six months residence in the state prior to admission to the bar for purposes of evaluation); *Martin v. Walton*, 368 U.S. 25 (1961), *dismissing for want of a substantial federal question the appeal from* 187 Kan. 473, 357 P.2d 782 (1960) (Kansas could require resident attorneys who regularly engaged in practice out of state *to* associate local counsel when appearing in Kansas).

value on judicial vindication of individual rights, "the just, *speedy*, and *inexpensive* determination of every action"[12] must stand as an important governmental objective.

United States District Judges Veronica D. Wicker and Morey L. Sear, both judges of the Eastern District of Louisiana, testified regarding the effect of general admission of nonresident attorneys on the efficient administration of justice. Judge Wicker was qualified and admitted as an expert in judicial administration. Prior to her appointment to the district court bench, she served as a United States Magistrate in this district and also served for a number of years as a clerk to an active judge of the Eastern District. Judge Sear was also qualified and admitted as an expert in judicial administration. In the past, he worked with Judge Alvin B. Rubin of the Fifth Circuit Court of Appeals in formulating methods for judicial case management. He has taught at the Federal Judicial Center since 1971 and has participated in numerous seminars on case management in federal district courts.

The testimony of Judges Wicker and Sear establishes that general admission of nonresident attorneys can impede the efficient administration of justice. The relative unavailability of nonresident counsel seriously impairs the administration of justice when quick action is necessary. The defendant judges summarized many of the difficulties posed by the unavailability of nonresident counsel in their answer, and Judges Wicker and Sear confirmed these assertions in their testimony:

> "It is not a rarity in the District Court that in Jones Act cases, as well as in other types of civil litigation, a Rule (30)(b)(2), FRCP, notice may issue for the emergency deposition of an important witness aboard a vessel temporarily present, say, in Bremen, West Germany or Brisbane, Australia, etc., with counsel for either party being nonresident requiring an emergency conference under Rule

[12] Fed.R.Civ.P. 1 (emphasis added).

> 30(b)(3), FRCP, or an emergency conference pursuant to Rule 26(c), FRCP. Many other discovery emergencies arise. Immediate non-availability of counsel defeats due process need[ed] for such emergency proceedings.
>
> "Emergencies also frequently arise under Rule 65(b), FRCP, in the issuance of temporary restraining orders. It has been the practice of the District Court in most injunction case instances to require at least an informal, immediate chambers conference with the parties' attorneys before issuance of a temporary restraining order. This cannot be accomplished if a party's attorney is in Idaho or California. It is also respondents' uniform experience that these and many other emergency matters cannot possibly be handled always by telephone or correspondence.
>
> "Production and inspection of documents pursuant to Rule 34 FRCP, would be unnecessarily difficult and in many instances prejudicially and expensively delayed if there is no local counsel to respond.
>
> "In sum, the requirements of Rule 5(b), FRCP, and other requirements as to notice, are defeated if a 'party' is not conveniently located within the geographical jurisdiction of the District Court. The emergency and short notice holdings of a plethora of proceedings affecting litigation and the District Court's dockets occur daily and frequently and would be made impossible in must instances if attorneys at interest are not locally available."

The two judges further testified that scheduling routine court matters is also exceedingly difficult when nonresident counsel are involved. Nonresident counsel are present in the district only rarely and thus must of necessity seek either preferential scheduling or exceptions from required appearances. These difficulties unduly complicate case management, particularly in criminal matters, where speedy trial rights are involved.

The means chosen by the Eastern District to alleviate these difficulties are not unduly restrictive. Some decisions have indicated that a court may exclude nonresident attorneys from general admission altogether. *See Aranson v. Ambrose*, 479 F.2d 75 (3rd Cir. 1973); *Wilson*, 416 F.Supp. at 987; *Brown*, 359 F.Supp. at 555, 561-62. Yet Local Rule 21.2 requires only that a nonresident attorney admitted to practice in Louisiana must establish an office in Louisiana in order to qualify for admission to the Eastern District bar. Fulfilling this requirement makes the nonresident attorney more available to the court, as well as to litigants and their counsel.[13] This increased availability of the attorney would mitigate some of the impediments to the efficient administration of justice posed by general admission of nonresident attorneys.

Significantly, Frazier relies upon two opinions which in fact support the view that a court can properly require a nonresident attorney to open a local office as a prerequisite to general admission to the bar. In *Stalland v. South Dakota Board of Examiners*, 530 F.Supp. 155 (D. S.D. 1982), Chief Judge Bogue held that South Dakota could not bar residents from general practice in its court. Yet Chief Judge Bogue and Judge Bownes and Coffin in *Piper* all were of the opinion that a court might require a nonresident to maintain a local office in order to facilitate availability for court. *See Piper*, 723 F.2d at 117 (opinion of two judges of an equally divided court sitting *en banc*); *Stalland*, 530 F.Supp. at 161. That is precisely the requirement that the Eastern District has established for general admission of nonresident attorneys. The Court can find no pertinent authority that would hold this particular requirement to be impermissible.

Furthermore, it is no criticism of Rule 21.2 that, under its terms, a resident attorney need not open a local office to obtain admission to the Court's bar. The Court did not adopt the rule in a vacuum. That a resident attorney with a practice of any import

[13] Presumably, a nonresident attorney or firm with a Louisiana office would have to practice in Louisiana with some regularity in order to make the office profitable.

must of necessity open an office is abundantly clear. Requiring resident attorneys to open an office in Louisiana, therefore, would be almost wholly superfluous. In the rare situation where a resident attorney does not have an office, the attorney is nonetheless locally available to a greater extent than is the case with most nonresident attorneys. His admission does not raise the same concern for the efficient administration of justice that admission of nonresident attorneys does.

The Court therefore concludes that requiring nonresident attorneys to open a local office as a prerequisite to general admission is a means that is substantially related to the important governmental objective of promoting the efficient administration of justice. Rule 21.2 does not deprive Frazier of the equal protection of the laws.

Privileges and Immunities

Frazier has mounted his most strenuous attack on Rule 21.2 under the Privileges and Immunities Clause.[14] He insists that a functional analysis of the scope of the clause requires us to conclude that the practice of law is a fundamental right. This clause was adopted to promote comity among the several states; it is highly unlikely that it limits the rule-making power of the federal judiciary. *See Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 145 (1st Cir. 1976); *United States v. Barnett*, 330 F.2d 369, 388 (5th Cir. 1963); *Duehay v. Acacia Mutual Insurance Co.*, 105 F.2d 768, 775 (D.C. Cir. 1939); *Lung v. O'Cheskey*, 358 F.Supp. 928, 931 (D. N.M.), *summarily aff'd*, 414 U.S. 802 (1973). But even if the clause does apply here, either directly or indirectly as a component of Fifth Amendment due process, Rule 21.2 passes muster.

In applying the Privileges and Immunities Clause, a court must first determine whether the interest asserted by the out-of-state resident is sufficiently fundamental to the promotion of interstate harmony so as to fall within the purview of the clause.

[14] U.S. Const., Art IV, § 2, cl. 1.

If the privilege or immunity is subject to protection under the clause, the next inquiry concerns whether there is a "substantial reason" for discriminating against nonresidents and whether the discrimination actually imposed "bears a close relation" to the supporting reason or reasons. *United Building and Construction Trades Council v. Camden*, 104 S. Ct. 1020, 1027-30 (1984).

Here, it is extremely dubious that Frazier's interest in practicing in federal court in Louisiana is fundamental to, or even remotely relevant to, the promotion of interstate harmony. Surely, Frazier would not suggest that Mississippi would view the action of a federal court sitting in Louisiana as an affront to the comity exercised between Louisiana and Mississippi. The point is not a critical one, however. The foregoing equal protection analysis establishes that the unrestricted general admission of nonresident attorneys to the Eastern District bar impairs the efficient administration of justice. Thus, there is a "substantial reason" to treat nonresident attorneys differently than resident attorneys. The discrimination imposed, the requirement that nonresident attorneys open a Louisiana office, bears a close relation to this substantial reason because it alleviates the problems presented by general admission of nonresident attorneys without greatly restricting the ability of those attorneys to practice before the Court. The Court therefore concludes that Rule 21.2 would not violate the Privileges and Immunities Clause if it were applicable. *Accord Piper*, 723 F.2d at 117 (opinion of two judges of an equally divided court sitting en banc); *Stalland*, 530 F.Supp. at 161.

Freedom of Association and Expression

Plaintiff lastly contends that relegating him to *pro hac vice* admission, which requires him to associate local counsel, has a "chilling effect" on his freedom of association, expression and representation in the Eastern District. This Court has already found as a fact that Frazier would not be denied *pro hac vice* admission if he complied with Rule 21.5. Thus, Frazier could not argue with any force that the Eastern District Rules in fact *deprive* him of his first amendment freedoms. The most that can

be said is that the Rules place an incidental burden on the exercise of these freedoms by restricting the manner in which they are exercised. This incidental burden will not violate the first amendment if it operates without regard to the content of the expression or the character of the association and it serves significant governmental interests. *Cf. Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981) (time, place and manner restriction on distribution of material at a state fairgrounds).

That Rules 21.2 and 21.5 operate without regard to the content of expression or the character of association is clear. On their face, the Eastern District Rules do not restrict the appearance of out-of-state counsel on the basis of the beliefs they seek to espouse or upon the character of their associations. This Court finds as a fact that the Eastern District judges do not apply the Rules in a manner which discriminates against attorneys because of their beliefs or associations. The district judges do not have unbridled discretion in this regard. The Fifth Circuit is ever vigilant in ensuring that local rules do not operate with such an improper effect. *See, e.g., Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968) (the court invalidated district court restrictions on *pro hac vice* admission that severely impaired the ability of Negroes to obtain attorneys for civil rights claims).

The rules are also reasonable in light of the significant governmental interests resolved. This Court has discussed at length, in regard to Frazier's equal protection challenge, the reasonableness of restrictions imposed by Rule 21.2 on the manner of a nonresident attorney's appearance in the Eastern District. Rule 21.5 is a fitting complement to Rule 21.2. Rule 21.5 serves the goal of promoting the efficient administration of justice by requiring the association of an attorney who is locally available to the Court. The Rule further serves the goal of assuring the professional integrity of the attorneys that practice before the Court by requiring the applicant for *pro hac vice* admission to file a certificate of good standing and report on any disciplinary or criminal proceedings brought against him. These minimal restrictions on a nonresident's freedom of expression

and association in the Eastern District are amply justified by the significant governmental interests served.

Conclusion

Frazier's challenges to the Eastern District's limitations on admission of nonresident attorneys under the Commerce Clause, the Full Faith and Credit Clause, the equal protection component of the Due Process Clause, the Privileges and Immunities Clause, and the first amendment all fall short of the mark. Accordingly, his petition for injunctive and other extraordinary relief is DENIED and his suit will be DISMISSED on the merits and with prejudice.

It is appropriate to make this personal observation. Mr. Frazier and counsel for both sides have outlined their positions admirably, with a clarity that has been immensely useful. All have revealed their highest respect for the judicial institutions to which they are so obviously dedicated.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 12th day of September, 1984.

/s/ Edwin F. Hunter, Jr.
EDWIN F. HUNTER, JR.
UNITED STATES SENIOR
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF

MISC NO. 873 (EFH,Jr.)

DAVID C. FRAZIER

JUDGMENT

This action came on for trial before the Court, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the plaintiff's petition for a writ of prohibition and declaratory and injunctive relief be, and is hereby, denied, and that this action be dismissed with prejudice.

Lake Charles, Louisiana, September 12th, 1984.

/s/ Edwin F. Hunter, Jr.
EDWIN F. HUNTER, JR.
UNITED STATES SENIOR
DISTRICT JUDGE

APPENDIX E

PERTINENT CONSTITUTIONAL PROVISIONS AND RULES

The Fifth Amendment to the United States Constitution reads in pertinent part:

No person shall. . . be deprived of life, liberty, or property, without due process of law. . . .

* * *

Rule 21 of the Rules of the United States District Court for the Eastern District of Louisiana reads in pertinent part:

RULE 21. ATTORNEYS.

21.1. *Roll of Attorneys.* The bar of this court consists of those lawyers admitted to practice before this court who have taken the prescribed oath and signed the roll of attorneys for this district.

21.2. *Eligibility.* Any member in good standing of the bar of the Supreme Court of Louisiana who resides or maintains an office for the practice of law in the State of Louisiana is eligible for admission to the bar of this ccurt.

21.3. *Procedure for Admission.*

a. Each applicant for admission to the bar of this court shall file with the clerk a written petition signed by him and endorsed by two members of the bar of this court listing the applicant's residence and office address, his general and legal education, the courts that have admitted him to practice, and stating that the applicant is qualified to practice before this court, is of good moral character, and is not subject to any pending disbarment or professional discipline procedure in any other court. If the applicant has previously been subject to any disciplinary pro-

ceedings, full information about the proceedings, the charges and the result will be given.

b. The petitioner may then be admitted upon motion of a member of the bar of this court made in open court or in chambers, and upon taking an oath to conduct himself as an attorney or counsellor of this court uprightly and according to law and to support the Constitution of the United States. He shall then, under the direction of the clerk, sign the roll of attorneys and pay the fee required by law. Unless such a motion for admission is made within 6 months of the filing of the petition, the clerk may destroy the petition and a new petition will be necessary before the applicant can be admitted.

21.3.1. *Continuing Eligibility.* In order to continue as a member of the bar of this Court, an attorney must continuously and without interruption reside or maintain an office for the practice of law in the State of Louisiana.

An attorney admitted to practice before this Court, but who does not continuously qualify as set out herein, shall notify the Court within 30 days following termination of his qualifications that he desires to withdraw from the practice in this Court or that he desires a hearing to show cause why he should be permitted to continue to practice, though not qualified under the residence or office requirements of the rules.

An attorney who is not qualified to practice before this Court on the effective date of this rule (as amended), having previously failed to maintain the residence or office requirements of the rule, shall be allowed 90 days within which to notify the Court of his election to withdraw from practice in this Court or to request a hearing as described above.

At the time an attorney files the annual statement pursuant to the Rules of Disciplinary Enforcement of this Court, if the attorney has changed his residence or office address since the time of filing the previous annual statement, he shall certify that he is still qualified to practice before this Court pursuant to the requirements set out herein.

21.4. *Attorney Representation.* In all cases before this court, any party who does not appear in proper person must be represented by a member of the bar of this court, except as set forth below.

21.5. *Visiting Attorneys.* Any member in good standing of the bar of any court of the United States or of the highest court of any state, who is ineligible to become a member of the bar of this court, may, upon written motion of counsel of record who is a member of the bar of this court, by ex parte order, be permitted to appear and participate as co-counsel in a particular case.

The motion must have attached to it a certificate of the presiding judge or clerk of the highest Court of the State, or Court of the United States, where he has been so admitted to practice, showing that the applicant attorney has been so admitted in such Court, and that he is in good standing therein.

The applicant attorney shall state under oath whether any disciplinary proceedings or criminal charges have been instituted against him, and if so, full information about the proceedings or charges and the results thereof shall be disclosed.

An attorney thus permitted to appear may participate in a particular action or proceeding in all respects, except that all documents requiring a signature of counsel for a party may not be signed solely by such attorney, but must bear the signature also of local counsel with whom he is associated.

Local counsel shall be responsible to the Court at all stages of the proceedings.

Designation of the visiting attorney as "Trial Attorney," pursuant to Rule 2.3 herein shall not relieve the local counsel of the responsibilities imposed by this Rule.

21.6. *Waiver by Court Order of Requirements for Local Counsel.* In any civil action a non-resident counsel meeting the criteria of Rule 21.5 may be authorized by court order to appear and act for any party who is a non-

resident of the State of Louisiana without joinder of local co-counsel when it is shown that:

a. the non-resident party would suffer hardship by joinder of local counsel, and

b. the obligations and duties of counsel in the particular litigation will be fulfilled.

21.7. *Familiarity with and Compliance with Rules.* Everyone who appears in court in proper person and every attorney or student permitted to practice in this court shall be familiar with these rules. Willful failure to comply with any of them, or a false certificate of compliance, shall be cause for such disciplinary action as the court may see fit, after notice and hearing.

21.8. *Suspension—Disbarment—Discipline.*
[Repealed]

21.8.1. *Counsel's Failure to Appear.* Counsel's failure to appear, or appearing only extremely late, for conferences with the court or its magistrates, or for the argument of motions, trial, or any other proceeding causes great inconvenience to the court and opposing counsel, and in some instances to witnesses and jurors. Accordingly, it will be the court's policy to impose costs or sanctions as follows:

a. For failure to appear, or appearing extremely late at any proceeding before any of the judges or magistrates, when the lawyer has been given timely notice of the conference or hearing, and has failed in advance of it to seek a continuance, and in the absence of adequate excuse:

(1) If this is the first time counsel has been delinquent, or if the last time he failed to appear promptly was more than two years ago, he shall be ordered to pay a fee in a reasonable amount to each opposing counsel who has appeared.

(2) If this is the second time, and it is within two years of the first, the lawyer will be required to pay a fee in a reasonable amount to each opposing counsel who has appeared, and will, in addition, be cited to show cause before a judge of this court why he should not be suspended from practice for a period of time or subjected to some other form of disciplinary action.

(3) The fee is not to be waived, nor is it to be returned or taken into account on settlement. It is not to be billed or charged in any way to a client.

b. For failure without adequate excuse to appear for a trial, or a hearing for which witnesses have been summoned, or for unreasonable delay in appearing at such times, the lawyer will be required to show cause why he should not be subject to disciplinary action by the court.

OPPOSITION

BRIEF

NO. 86-475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID C. FRAZIER,

Petitioner,

versus

HONORABLE FREDERICK J. R. HEEBE, CHIEF JUDGE,
United States District Court
for the Eastern District of Louisiana, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Curtis R. Boisfontaine
(Counsel of Record)
Sally A. Shushan
Sessions, Fishman, Rosenson,
Boisfontaine, Nathan & Winn
3500 Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana 70170
Telephone: (504) 582-1500

Attorneys for Respondents

19 pp

QUESTION PRESENTED

May the United States District Court for the Eastern District of Louisiana, pursuant to its inherent rule-making authority, require that applicants for general admission to its bar either reside or maintain an office in the State of Louisiana?*

*Pursuant to Supreme Court Rule 34.2, respondents submit this Question Presented. This Question is different from that of petitioner who states:

> "May a federal district court require applicants for admission to its bar to live or maintain an office in the state where that court sits, when such a requirement would be unconstitutional if imposed by a state court."

As shall be explained in respondents' brief, petitioner's Question Presented is incorrect and misleading insofar as it suggests the Local Rules of the Eastern District would be unconstitutional if imposed by a State court.

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IN THE
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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, all of the United States District Judges of the Eastern District of Louisiana in regular active service, respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed herein by David C. Frazier.

STATEMENT OF THE CASE

The facts of the case are stated fully in the decisions of the District Court, 594 F.Supp. 1173 (Petitioner's Appendix D at 23a-25a), and the Court of Appeals, 788 F.2d 1049 (Petitioner's Appendix A at 1a-3a).

SUMMARY OF ARGUMENT

Petitioner contends that Local Rules promulgated by the United States District Court for the Eastern District of Louisiana[1] discriminate against attorneys who are admitted to practice before the Louisiana Supreme Court but who do not reside in Louisiana. In fact, however, a non-resident attorney may be admitted to generally practice in the Eastern District. The Local Rules in question impose an alternative requirement that a lawyer *either* reside *or* maintain an office for the practice of law in the State of Louisiana. As such, a lawyer in good standing at the bar of the Supreme Court of Louisiana may reside anywhere he so desires *and* be a member of the bar of the Eastern District as long as he maintains an office for the practice of law in the State. In short, the Local Rules apply to all members of the Louisiana bar wherever resident and in no way discriminate against non-resident attorneys.

Additionally, while petitioner attacks the constitutionality of the Local Rule requiring continuing eligibility, that Rule, in fact, provides for even-handed treatment of all attorneys practicing before the Eastern District Court. Thus, a member of the bar of the Eastern District, admitted at the time he was a resident of the State of Louisiana, must continuously maintain an office for the practice of law in the State, should he decide to reside elsewhere.

Petitioner has presented no facts whatsoever to refute respondents' evidence that the Local Rules do not discriminate in any way against non-resident attorneys. Moreover, petitioner has failed entirely to offer any evidence of dis-

1. Petitioner specifically attacks the constitutionality of Local Rules 21.2 and 21.3.1 (Petitioner's Appendix E at 44a-45a).

criminatory enforcement or application of the Local Rules. No prior decision has ever suggested that the kind of alternative criteria provided by the Local Rules should be stricken for any reason.

ARGUMENT

THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT

In petitioning this Honorable Court, petitioner principally relies on the decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. _____, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985), which invalidated a rule of the New Hampshire Supreme Court which required an applicant for admission to the New Hampshire bar to be a *bona fide* resident of the State of New Hampshire.

The rule of the New Hampshire Supreme Court did not include two critical elements contained in the Local Rules under scrutiny herein. The Local Rules of the Eastern District require that every member of the Louisiana bar, whether resident in Louisiana or elsewhere, must either be a resident of, and continuously maintain a residence in Louisiana, or continuously maintain an office for the practice of law in Louisiana. In sharp contrast, the New Hampshire rule did not allow Piper the option of maintaining an office in New Hampshire, nor did it require that an applicant maintain continuing residency after having been admitted to the New Hampshire bar.

These distinctions were considered significant throughout the judicial course of the *Piper* decision. Thus, the United States Court of Appeals for the First Circuit, in finding the New Hampshire rule violated the Privileges and Immunities Clause, indicated that its decision rested in large part upon

the fact that the New Hampshire rule did not provide for continuing residency and/or for the option of maintaining a law office in the State:

> "It should be observed as well that New Hampshire's rule does not require continuing residency, but only residency at the time of admission to the bar, combined with intent to remain. This permits bar members to leave the State after admission without forfeiting their membership and belies the State's asserted justification for the rule."
>
> * * *
>
> "To facilitate availability for Court, the State might require that nonresidents maintain an office or affiliate themselves with lawyers within the State."

723 F.2d 117 (1st Cir. 1983) (en banc).

This Court, in affirming the First Circuit's ruling, also found the deficiencies of the New Hampshire rule to be of importance.

> "New Hampshire's 'simple residency' requirement is underinclusive as well, because it permits lawyers who move away from the State to retain their membership in the bar. There is no reason to believe that a former resident would maintain a more active practice in the New Hampshire courts than would a nonresident lawyer who had never lived in the State."

105 S.Ct. 1279, n. 19.

* * *

> "The trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who would be available for unscheduled meetings and hearings."

105 S.Ct. 1280.

These deficiencies are conspicuously absent from the Local Rules here in question.

Further pointing out the distinguishing features between the New Hampshire rule and the Local Rules involved herein, Justice White, in his concurring opinion in *Piper*, pointed out that Piper intended to maintain a law office in the State of New Hampshire, yet the New Hampshire rule prohibited her general admission to practice under those circumstances. 105 S.Ct. 1281.

On the basis of the Eastern District's alternative requirements of maintenance of a residence *or* law office in the State, *and* its requirement of continuing eligibility to qualify for general practice before the Eastern District Court, the Local Rules are clearly distinguishable from the features of the New Hampshire rule which were found violative of the Privileges and Immunities Clause. Petitioner's basic premise that the Eastern District Local Rules impose the same restrictions on bar applicants as were presented in *Piper* is simply not the case.

Moreover, petitioner's contention that the Local Rules would be unconstitutional if imposed by a State court is erroneous. The distinguishing features of the Local Rules involved herein provide even-handed treatment to all Louisiana-

licensed attorneys, and the Rules do not impose any discrimination upon non-residents which is actionable under the Privileges and Immunities Clause or the Due Process Clause of the Fifth Amendment.[2]

THE PRIVILEGES AND IMMUNITIES CLAUSE IS INAPPLICABLE

In urging the Court to apply a "privileges and immunities" analysis to this case, petitioner glosses over the source of the Eastern District Court's authority to enact Local Rules. Like all federal district courts, the Eastern District exists under the auspices of Article III of the United States Constitution. Pursuant to Congressional and Judicial Conference mandates, 28 U.S.C. §§1654 and 2071, Fed.R.Civ.P. 83, federal district courts are empowered to enact their own individual rules. Implicit in those authorizations is the recognition that there need not be uniform local judicial rules. Thus, while petitioner has consistently argued that the Local Rules should be stricken in order to promote national and interstate harmony, citing Smith, *Time for a National Practice of Law Act*, 64 A.B.A.J. 557, 558 (1978), petitioner has found no authority whatsoever indicating that Congress has ever expressed any intent that a district court's local rules governing bar admission be an integral part of any required national

2. See also, *Stalland v. South Dakota Board of Bar Examiners*, 530 F.Supp. 155, 160 (D. S.D. 1982), indicating that a State could require non-resident attorneys to maintain an office in the State or require association of local counsel; *In Re Jo d*, 391 Mass. 227, 461 N.E. 2d 760 (1984), indicating a continuing residency requirement or an association of local counsel requirement would be constitutional.

harmony.[3] By the same token, it should be noted that 24 federal districts (in 10 federal circuits) have enacted rules similar to the Local Rules of the Eastern District under consideration herein.[4]

Indeed, recent circuit court cases construing rules respecting the admission of lawyers to practice before federal district courts have consistently recognized the courts' inherent power to enact such rules. *See, e.g., Brown v. McGarr*, 774 F.2d 777 (7th Cir. 1985); *Matter of Roberts*, 682 F.2d 105 (3rd Cir. 1982); *Aronson v. Ambrose*, 479 F.2d 75 (3rd Cir. 1973), *cert. denied*, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (1973); and most recently, *Frazier v. Heebe*, 778 F.2d 1049 (5th Cir. 1986). Clearly, the Privileges and Immunities Clause, which by its very terms is a limitation on State action, does not limit the rule-making power of the federal judiciary. *See, e.g., Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 145 (1st Cir. 1976).

THE LOCAL RULES ARE NOT VIOLATIVE OF THE FIFTH AMENDMENT

Even though petitioner concedes that the Privileges and Immunities Clause does not limit the federal action involved herein, he persists in analogizing the disparate facts and legal analysis involved in *Piper* to the case at bar. Petitioner's only claim before this Court is that the Local Rules violate the

3. *See, Retaining Out-Of-State Counsel: The Evolution of a Federal Right*, 67 Colum.L.Rev. 731, 737-38 (1967), pointing out that although numerous proposals have been made for uniform federal regulation of a federal bar, Congress has instead chosen to delegate to the district courts the authority to enact local rules regulating admission to the bar.

4. *Frazier v. Heebe*, 788 F.2d 1054 n.7; Petitioner's Appendix A at 7a n.7.

Fifth Amendment's Due Process Clause. Yet *Piper*, and the decisions cited therein, are not applicable to this challenge since neither the district court, the United States Court of Appeals for the First Circuit, nor this Honorable Court considered Piper's claims that the New Hampshire rule deprived her of due process of law. *See*, 105 S.Ct. at 1272 n. 3.

Of particular importance in evaluating petitioner's claim that the Local Rules violate the Due Process Clause of the Fifth Amendment is an understanding of what attorneys seeking to practice law before the Eastern District may and may not do under the Local Rules. Petitioner is not being denied permission to practice law in the Eastern District Court. Under Local Rule 21.5, petitioner may qualify to practice in the Eastern District *pro hac vice*, and, under Local Rule 21.6, may have the requirement of associating local co-counsel waived.[5] Yet petitioner has never applied for *pro hac vice* admission in the Eastern District and therefore has made no showing that he has been prohibited from practicing before that court.

Thus, when the Local Rules are read *in pari materia*, it is clear that petitioner may practice before the United States District Court for the Eastern District of Louisiana even though he does not choose to reside or maintain an office

5. In fact, petitioner was represented in the district court by Gary L. Roberts, an attorney who resides and practices law in Pascagoula, Mississippi. Mr. Roberts was admitted to practice before the Eastern District under the Court's *pro hac vice* admission rule, Local Rule 21.5 (Petitioner's Appendix E at 46a), and, pursuant to the provisions of Local Rule 21.6 (Petitioner's Appendix E at 46a-47a), the requirement of associating local co-counsel was waived.

in the State:

> "We are persuaded that the regulatory scheme of the Eastern District bears sufficient rational relationship to that court's goal of an efficient administration of justice. We are further persuaded that, in reality, Frazier's ability to practice in the Eastern District is not inappropriately burdened by the rules."
>
> *Frazier v. Heebe*, 788 F.2d 1049, 1055 (5th Cir. 1986).

Where then is the burden or obstacle which petitioner contends is violative of the Fifth Amendment?

Matter of Roberts, 682 F.2d 105 (3rd Cir. 1982), addressed a claim of violation of the Fifth Amendment under equal protection principles in the context of a denial of an application for general admission to the bar of the United States Court for the District of New Jersey. The Third Circuit Court of Appeals disposed of the Fifth Amendment issue as follows:

> "Roberts claims that he has a constitutional right to be admitted to the bar of the district court because the record below is barren of evidence that would tend to show that he is morally or professionally unfit to practice law.
>
> * * *
>
> To invoke the protections of the Fifth Amendment, a litigant must first establish that the individual interest asserted is encompassed within its terms. The Amendment protects property interests created and defined by

> independent sources such as statutes, legal rules, or mutually explicit understandings, but it does not create property interests of its own force. Roberts does not cite any rule or statute, nor does he refer to any mutually explicit understanding, that would support his claim of denial of a property right to practice law in the district court. Nor can we conclude that application of Rule IV deprives appellant of a liberty interest protected by the Fifth Amendment."
>
> 682 F.2d at 107 (Citations omitted).

See also, Frazier v. Heebe, supra, 788 F.2d at 1052-53 (Petitioner's Appendix A at 4a-5a).

It is therefore apparent that petitioner has no "fundamental right" to practice law in the Eastern District granted by the Fifth Amendment, nor is he a member of any "suspect class" under that same provision. Additionally, and most importantly, petitioner has not been denied access to practice before the United States District Court for the Eastern District of Louisiana:

> "Here, Frazier is not 'irretrievably foreclosed' from appearing before the Eastern District; he need only comply with certain additional procedures which serve quite legitimate interests in ensuring that counsel is locally available to the court and in assuring that the attorney has the requisite ethical integrity."
>
> *Matter of Frazier*, 594 F.Supp. at 1181 (E.D. La. 1984).

In light of the foregoing, it is respectfully submitted that petitioner's claim of invalidity of the Local Rules pursuant to the Fifth Amendment is unwarranted and unsupported. Petitioner has not been deprived of any protection given others, and the requirements which have been applied to petitioner apply to all members of the Louisiana bar seeking admission to practice before the Eastern District.

CONCLUSION

The United States District Court for the Eastern District of Louisiana, pursuant to its inherent rulemaking authority, has enacted Local Rules 21.2 and 21.3.1 in order to further the legitimate governmental purpose of fostering efficient and effective administration of justice. Like 24 other federal district courts, the Eastern District Court perceived that lawyers who neither reside nor maintain an office in the State of Louisiana impede the efficient administration of justice more frequently than do attorneys who either reside or maintain an office in the State, and enacted Local Rules which are reasonably directed to furthering the Court's goal. Petitioner has made no showing whatsoever of any invidious, discriminatory or otherwise inappropriate basis for the Local Rules, and has further presented no basis in fact to show that the Local Rules discriminate in any way against non-resident attorneys, or that they are applied or enforced in a discriminatory fashion.

For the above and foregoing reasons, therefore, it is respectfully submitted that this Honorable Court should deny the Petition for Writ of Certiorari, as the Local Rules in question are valid, legal and constitutional enactments.

Respectfully submitted,

Sessions, Fishman, Rosenson,
Boisfontaine, Nathan & Winn
Curtis R. Boisfontaine
(Counsel of Record)
Sally A. Shushan
3500 Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana 70170
Telephone: (504) 582-1500

Attorneys For Respondents

REPLY

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PETITIONER'S REPLY MEMORANDUM

Cornish F. Hitchcock
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W. Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

Of counsel:
Gary L. Roberts
Roberts and Clark
P.O. Box 237
Pascagoula, Miss. 39567
(601) 762-7104

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Respondents.

PETITIONER'S REPLY MEMORANDUM

Legal claims aside, respondents' memorandum fails to offer any defense of the anomaly created by the court of appeals' decision, which allows a federal district court to require that members of its bar must live or have an office in the state where the district court sits, even though such a requirement could not be imposed on lawyers seeking a license to practice across the street in state court. Nor does it attempt to explain why this Court's recent equal protection rulings which invalidated various discriminations against out-of-staters (*see* Petition at 8) do not require that the restrictions here be set aside. And while respondents seek to distinguish *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), their arguments only serve to highlight why review should be granted.

It is important to note that the local rules in this case are far less precise than the rule invalidated in *Piper*, which required bar applicants to live within the geographic boundaries where the licensing court sat. Here, applicants can be admitted to the Eastern District bar so long as they live or have an office in the Eastern District, the Middle District or the Western District of Louisiana. Some of these locations can be hundreds of miles from the Eastern District courthouse, yet petitioner and others who live and work much closer to New Orleans, though not in Louisiana, are not eligible for admission to the Eastern District bar. Since *Piper* holds that a residency requirement which is limited to the geographic confines of the licensing court is unconstitutional, then the Eastern District's far less precise rules cannot meet the applicable constitutional standards, since they are neither closely tailored nor even rationally related to achieving the goals of lawyer competence and availability.

Respondents' memorandum tries (at 3-5) to distinguish *Piper* on two grounds: (1) the Eastern District imposes a continuing residence/office requirement, whereas New Hampshire required only residence at the time of admission, and (2) the Eastern District rules give non-residents an option not available in *Piper*, namely, opening an in-state office. Neither claim has merit.

As for the first point, nothing in *Piper* suggests that the rule would have been constitutional had it been more restrictive than it actually was. As for the second point, *Piper* forecloses the notion that the site of one's office is relevant in determining one's fitness to practice law. 470 U.S. at 286-87. And even if it were relevant, it is difficult to see how rules which are satisfied by an in-state office that may be hundreds of miles from the courthouse are even remote-

ly connected to the district court's interests in having cases efficiently litigated.

Moreover, this latter argument is at odds with *Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979), which held that the existence of an in-state office option could not save a residency requirement from being invalidated under the Privileges and Immunities Clause. In striking down a rule requiring bar applicants to live in the state or to work there for six months before receiving their license, the New York Court of Appeals stated that the rule improperly discriminated against out-of-state residents by imposing a requirement on them which was not imposed on state residents. 48 N.Y.2d at 269 & n.1, 397 N.E.2d at 1310 & n.1, 422 N.Y.S.2d at 641 & n.1. Because the rules at issue here operate in a similar manner, they too are invalid under the Privileges and Immunities Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Cornish F. Hitchcock
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W. Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

November 1986

AMICUS CURIAE

BRIEF

(3)

No. 86-475

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DAVID C. FRAZIER,
Petitioner,

v.

HONORABLE FREDERICK J.R. HEEBE, Chief Judge, United States District Court for the Eastern District of Louisiana, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION IN SUPPORT OF PETITIONER

LAWRENCE A. SALIBRA, II, ESQ.
Member, American Corporate Counsel Association
1225 Connecticut Avenue, N.W.
Suite 202
Washington, D.C. 20036

October 24, 1986

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Corporate Counsel Association (ACCA), seeks leave to file the attached brief *amicus curiae* in the above action. ACCA has secured permission to file this brief of the petitioner Frazier but not of the respondents, the Honorable Frederick J.R. Heebe, et. al.

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is composed of members of the bar who do not hold themselves out to the public for the practice of law and who are engaged in the active practice of law as employees of corporations, partnerships, and other organizations in the private sector. ACCA has approximately 7,000 members who are engaged in legal matters arising in a number of jurisdictions.

More and more corporations use attorneys employed in the corporate law department to handle litigation. Corporate practice is national in nature, and therefore, these attorneys must routinely handle litigation in a number of different jurisdictions. Because *pro hac vice* admissions and the need to associate with local counsel can be excessively burdensome and unnecessarily costly, corporate counsel often seek bar admissions in several federal district courts. The decision below upholding residency requirements for admission to federal district courts will result in a wasteful expenditure of corporate resources without providing the client, the court or the public with an overriding benefit.

The question of a lawyer's residency in a state as a qualification for admission to a United States federal district court is of great concern and importance to the members of ACCA and the clients they serve, because it affects the ability of corporate counsel to represent effectively their clients in those federal jurisdictions with such residency requirements.

Respectfully submitted,

LAWRENCE A. SALIBRA, II, ESQ.
Member, American Corporate
Counsel Association
1225 Connecticut Avenue, N.W.
Suite 202
Washington, D.C. 20036

October 24, 1986

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BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Amicus Curiae, American Corporate Counsel Association, supports the petition for certiorari of David C. Frazier, and respectfully requests this Court to issue a writ of certiorari.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is composed of members of the bar who do not hold themselves out to the public for the practice of law and who are engaged in the active practice of

law as employees of corporations, partnerships, and other organizations in the private sector. ACCA is the only national bar association whose efforts are devoted exclusively to the professional needs of attorneys who are members of the legal staffs of organizations in the private sector. ACCA has approximately 7,000 members who are employed as corporate counsel by some 3,000 organizations.

ACCA seeks to promote rules and procedures concerning access and admission to practice so that corporate counsel can adequately manage corporate legal affairs consistent with bar authorities' and ACCA's interest in maintaining high standards of competence. The question of a lawyer's residency in a state as a qualification for admission to a United States federal district court sitting in that state is of great concern and importance to the members of ACCA and the clients they serve, because it affects the ability of corporate counsel to represent effectively their clients in the states which have such requirements for admission.

Most recent and dramatic among efforts to control litigation costs and make the litigation process more efficient has been the movement toward litigating in-house. This rule has the serious consequence of escalating the costs of and otherwise inhibiting that effort.

The challenged admission requirements do not address attorney competence. Instead, they are artificial barriers to practice which deter the provision of more cost effective legal services to those corporations that use inside counsel. Thus, this case is of significant interest to the members of ACCA.

JURISDICTION

The jurisdictional grounds are fully set forth in the Brief of the Petitioner and need not be set forth here again in accordance with Rule 36.5 of this Court.

SUMMARY OF ARGUMENT

The in-house segment of the bar is the most rapidly growing portion of the bar. The nature of corporate practice is that the in-house lawyer often needs to represent the client in a number of jurisdictions including some in which he or she has not previously been admitted to practice or has an office.

The net impact of the Eastern District Rule limiting admission to attorneys who reside in the state and similar rules in other districts is to effectively foreclose the majority of inside attorneys from the admissions process. Under the rule, the corporate client is forced to hire local counsel, even though a particular matter could be handled more effectively by the corporation's inside counsel. Such a result is a wasteful expenditure of corporate resources without providing the client, the court or the public with an overriding benefit.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE IT CREATES INEFFICIENCY IN THE ADMINISTRATION OF THE JUSTICE SYSTEM AND INCREASES THE COST OF LITIGATION FOR ACCA CLIENTS.

There has been a recent dramatic move toward handling corporate litigation with attorneys employed in the corporate law department. This move to in-house litigation is a natural consequence of the national character of corporate practice and the economic realities of the litigation environment.

Litigating with inside counsel is an effective technique for litigation cost control. This is because an in-house legal staff can develop an intimate knowledge of the business and technology of the client. It is prohibitively expensive for outside lawyers to develop this same understanding of the details of the client's legal needs. Fur-

ther, it is unnecessarily redundant if different outside counsel must be thoroughly briefed in each jurisdiction in which the corporation may be involved in litigation.

The enormous financial savings attainable by litigating in-house have recently been demonstrated by an internal study conducted by Travelers Insurance Company. The study covered a four year period from January 1, 1980 to January 31, 1984, and involved a comparison of costs associated with property and casualty claims. Cases were randomly assigned [1] to inside and outside counsel and a comparison was made of the costs associated with the resolution of the claims. Data was arranged so that the costs of similar outcomes in terms of settlements or judgments were compared. The comparisons were then evaluated in two groups, those where settlement or judgments were below $100,000.00 or legal fees less than $20,000.00, and those with judgments above $100,000.00 or legal fees over $20,000.00. In-house costs including lawyers' salaries and all overhead expenses (less payroll taxes) were compared to outside fees and the results were dramatic. For the category below $100,000.00 and legal fees less than $20,000.00, outside counsel were 32% more expensive than inside counsel. For the category above $100,000.00 or legal fees in excess of $20,000.00, outside counsel was 90% more expensive than inside counsel. What this illustrates is that economic reality will result in more and more corporations undertaking to litigate in-house and out of necessity, that litigation will take place on a national basis.

The Rule at issue in this case, and similar rules in other federal district courts foreclose admission to corporate counsel who handle litigation in a district but do not reside there. Therefore, the rule substantially hinders the achievement of enormous cost savings for the company using inside litigators.

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[1] Exotic cases such as large class actions and cases with no expenses were deleted from the sample.

II. THIS COURT SHOULD REVIEW THIS CASE BECAUSE IT PRESENTS IN THE FEDERAL CONTEXT THE VERY SAME ISSUES AND ARGUMENTS WHICH THIS COURT REJECTED WITH RESPECT TO THE STATES.

In *Supreme Court of New Hampshire v. Piper*, 470 U.S. ——, 105 S. Ct. 1272, 85 L.Ed. 2d 205 (1985) this Court rejected a residence requirement as a condition of admission stating:

> "In summary, the State neither advances a 'substantial reason' for its discrimination against nonresident applicants to the bar, nor demonstrates that the discrimination practiced bears a close relationship to its proffered objectives." 84 L.Ed. 2d at 215.

Although *Piper* was predicated on the Privilege and Immunities Clause which does not limit federal action, the petitioner in this case urged that the same analysis be "incorporated into the Fifth Amendment's Due Process Clause in the same way that equal protection analysis has been employed to review federal discrimination" or under a "more traditional equal protection analysis." See Petitioner's Brief at 3-4. We agree because the federal restriction in this case has the same costly impact on the clients of ACCA members as did the New Hampshire requirement in *Piper*.

The Fifth Circuit affirmed the constitutionality of the Rule in this case based upon the same rationale that was advanced by the state but rejected by this Court in *Piper*. Judge Goldberg in his dissent in the present case correctly characterized the genesis of this rationale when he said:

> "The testimony excerpted here is neither extraordinary or inexplicable. Insularity and provincialism are not peculiar to the Eastern District of Louisiana but form part of a widespread, basic socio-cultural pattern. This explains why, for example, most people cheer for the 'home team', no matter how bad it is." *Id.* at 14a.

More important than its genesis is the fact that the evidence adopted by the majority in its opinion as adequate to a due process analysis suffers from the distinct lack of analytical rigor noted by Judge Goldberg:

> "I do not make a fetish of statistics. But generalized, visceral reactions and vague, anecdotal reminiscences of this sort do not rise to the level of legally probative evidence; they cannot supplant the need for hard, empirical data when the Constitution's guarantee of the equal protection of the laws is at stake. Thus, even if appellees' evidence had been relevant—which, as I have explained above, it is not —I would hold that it is insufficient as a matter of law." *Id.* at 19a.

This Court should review this case because it presents the same factual issue as *Piper* in a federal context. The decision below cannot the reconciled with the principles and outcome of this Court in *Piper*.

III. *PRO HAC VICE* ADMISSION IS NOT A SATISFACTORY ALTERNATIVE.

It has been established in this case that petitioner could have practiced before the Eastern District on a *pro hac vice* basis. This Court should not assume that *pro hac vice* admissions are a solution to the problem of general admissions.

First, in certain federal district courts, *pro hac vice* admissions are limited to once a year [2] or once in a life time.[3] Such rules would certainly present a major obstacle to in-house counsel who have a number of cases in a particular jurisdiction. It is, in fact, these very attorneys who would seek general admission to avoid the cost and inconvenience of the *pro hac vice* process.

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[2] United States District Court for the District of Puerto Rico, Local Rule 204.2.

[3] United States Northern District of Florida, Rule 4(D)(1).

Second, the *pro hac vice* process presents unnecessary opportunities for abuse. Members of our organization have experienced the threatened revocation of *pro hac vice* admissions in federal courts to force settlements. For example, counsel is aware of a recent instance in which inside counsel had *pro hac vice* admission in a federal court denied apparently to force settlement or to sanction counsel for having insisted on his client's rights under the rules. When the court's action was challenged under the Fifth Circuit authority of *In Re Wilson Evans*, 524 F. 2d 1004 (5th Cir. 1975), the court granted the *pro hac vice* admission but only after substantial expense was incurred by the client in preparing local counsel to try the case in the event trial commenced before the issue was resolved.

Third, the local counsel requirement is a costly anachronism of this district court's *pro hac vice* rules. The rationale for local counsel is predicated on two grounds—the availability for emergency hearings and familiarity with local rules. *Amicus* has serious doubt as to whether local counsel, in fact, are more familiar with local rules than non-resident counsel who conduct a great deal of litigation in the district. However, even if there is merit to that position, requiring the purchase and review of the local rules would be a considerably less onerous alternative.[4]

Finally, justifying the local counsel requirement on the basis that the attorney will be available in an emergency is unsound for two reasons. First, even if local counsel

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[4] This Court rejected a similar argument in *Piper*:

> "There is no evidence to support the State's claim that nonresidents might be less likely to keep abreast of local rules and procedures. Nor may we assume that a nonresident lawyer —any more than a resident—would disserve his clients by failing to familiarize himself with the rules. As a practical matter, we think that unless a lawyer has, or anticipates, a considerable practice in the New Hampshire courts, he would be unlikely to take the bar examination and pay the annual dues of $125." 84 L.Ed.2d at 214.

were the only one available, it is unlikely he or she would know enough about the case to be helpful. In fact, this requirement runs directly counter to the key reason for having a non-resident counsel in the first instance—the client does not want to re-educate another lawyer. Second, those situations where there is an emergency can be effectively handled by teleconference regardless of the location of the lawyers. More and more courts are utilizing teleconference technology for oral arguments in situations where personal appearance had been the only alternative. As this Court noted in *Piper*, "[i]n many situations, unscheduled hearings may pose only a minimal problem for the nonresident lawyer. Conference telephone calls are being used increasingly as an expeditious means of dispatching pretrial matters." 84 L.Ed.2d at 215, n. 21.

CONCLUSION

Amicus has been active in helping to solve the litigation congestion of our court system and in seeking ways to reduce the costs of resolving disputes. *Amicus* believes that litigation costs can be substantially reduced by using inside counsel. The detailed study of Travelers Insurance Companies demonstrates that enormous savings potential of in-house litigation. The rule at issue in this case effectively impedes the growing practice of in-house litigation, and substantially increases the costs associated with the use of the courts without offsetting benefits to judicial administration. For this reason, and because of its conflict with this Court's decision in *Piper*, this Court should issue a writ of certiorari in this case.

Respectfully submitted,

LAWRENCE A. SALIBRA, II, ESQ.
Member, American Corporate
Counsel Association
1225 Connecticut Avenue, N.W.
Suite 202
Washington, D.C. 20036

October 24, 1986

PETITIONER'S

BRIEF

No. 86-475

IN THE
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Petitioner,

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HONORABLE FREDERICK J.R. HEEBE, Chief Judge, United States District Court for the Eastern District of Louisiana, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Cornish F. Hitchcock
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

Of counsel:

Gary L. Roberts
Roberts and Clark
P.O. Box 237
Pascagoula, Miss. 39567
(601) 762-7104

January 1987

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QUESTION PRESENTED*

May a federal district court require applicants for admission to its bar to live or maintain an office in the state where that court sits, when such a requirement would be unconstitutional if imposed by a state court?

---

*Other respondents not identified in the caption are the Honorable Morey L. Sear, the Honorable Charles Schwartz, Jr., the Honorable Robert F. Collins, the Honorable Adrian G. Duplantier, the Honorable George Arceneaux, Jr., the Honorable Veronica D. Wicker, the Honorable Patrick E. Carr, the Honorable Peter Beer, the Honorable A.J. McNamara, the Honorable Henry A. Mentz, Jr., the Honorable Martin L.C. Feldman, and the Honorable Marcel Livaudais, Jr.

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS BELOW

The opinion of the district court (Pet. App. 23a-42a) is reported at 594 F. Supp. 1173, and the judgment (Pet. App. 43a) is unreported. The opinions of the court of appeals (Pet. App. 1a-19a) are reported at 788 F.2d 1049; the court's judgment and the order denying rehearing and rehearing *en banc* (Pet. App. 20a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on 24 April 1986, and rehearing was denied on 25 June 1986. The petition for certiorari was filed on 23 September 1986 and was granted on 17 November 1986. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 1651.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The constitutional provisions and court rules at issue here appear as Appendix E to the petition (Pet. App. 44a-48a) and as Appendix A to this brief (App. 1a-5a).

STATEMENT OF THE CASE

Rule 21 of the United States District Court for the Eastern District of Louisiana (the "Eastern District") was adopted by the judges of that district and regulates the practice of law in that court. Under Rule 21.2, a lawyer can be admitted to the Eastern District bar if he or she (1) is a member in good standing of the Louisiana state bar and (2) "resides or maintains an office for the practice of law in the State of Louisiana" (App. 1a; Pet. App. 44a). The office requirement is apparently satisfied by having an in-state address and telephone number, as well as someone such as a secretary who can communicate with the lawyer if the district court tries to reach him or her. *See* Trial Transcript ("Tr.") 255. Under Rule 21.3.1, a lawyer must maintain an in-state residence or office not only at the time of admission, but for as long as the lawyer wishes to remain a member of the Eastern District bar (App. 2a-3a; Pet. App. 45a-46a).

Attorneys who do not qualify for general admission under Rule 21.2 may appear *pro hac vice* under Rule 21.5 by affiliating with a member of the Eastern District bar who must sign all the papers and who "shall be responsible to the Court at all stages of the proceedings" (App. 3a; Pet. App. 46a). This requirement can be waived if the non-resident counsel is representing a party who does not live in Louisiana and who "would suffer hardship by joinder of local counsel," provided that the "obligations and duties of counsel in the particular litigation will be fulfilled." *See* Rule 21.6 (App. 3a-4a; Pet. App. 46a-47a).

To assess the legal issues presented in this case, it is important to focus on what Rule 21 does and does not require.

Although the Rule governs the practice of law in the Eastern District, it does not require bar members to live or have an office in that district, nor even within a fixed radius of the courthouse in New Orleans. All that is required is a residence or office somewhere in Louisiana, be it in the Eastern, Middle or Western District of that state.

The effect of these requirements is that membership in the Eastern District bar is open to lawyers who live or practice in Monroe or Lake Charles, Louisiana, which are 200 miles from New Orleans, as well as lawyers in Shreveport, which is 300 miles away. *See* Appendix B, *infra* (App. 6a). Indeed, the Rule allows these attorneys to serve as 'local' counsel for out-of-state lawyers seeking to appear *pro hac vice* in the Eastern District. By contrast, membership in the Eastern District bar is denied to out-of-state lawyers even if they are located closer to New Orleans than many of these Louisiana lawyers.

Petitioner is an attorney whose efforts to gain admission to the Eastern District bar have been thwarted by Rule 21. He lives in Pascagoula, Mississippi and is a partner in a law firm in that city, which is approximately 110 miles from New Orleans. He is a member of both the Mississippi and Louisiana state bars, as well as the bars of the United States Courts of Appeals for the Fifth and Eleventh Circuits and the United States District Court for the Southern District of Mississippi (Pet. App. 1a, 23a).

On 27 April 1982, after petitioner had passed the Louisiana bar examination and had been admitted to the Louisiana state bar, he sought admission to the Eastern District bar. By letter dated 30 September 1982, the clerk informed him that his application had been denied because he neither lived nor had an office in Louisiana, as required by Rule 21.2 (Pet. App. 2a, 23a-24a).

This litigation began on 5 January 1983 when petitioner sought a writ of prohibition from the United States Court of Appeals for the Fifth Circuit on the ground that the restrictions in Rules 21.2 and 21.3.1 were unconstitutional, both on their face

and as applied to him. The court of appeals did not rule on his petition, but remanded the case to the Eastern District for appropriate proceedings and the entry of an appealable judgment, noting that the petition for extraordinary relief was carried with the case on remand (Pet. App. 2a, 23a). At a pretrial conference in March 1983, the presiding district judge suggested that petitioner file a complaint naming as defendants the United States District Judges in regular active service in that district (R. 20), and petitioner recast his petition to the court of appeals in that form. The active and senior judges in the Eastern District recused themselves, and the case was assigned to Edwin F. Hunter, Jr., a Senior District Judge from the Western District of Louisiana, who held a one-day bench trial in April 1984 (Pet. App. 2a-3a, 23a).

Although petitioner challenged these rules on a number of theories in district court, his principal claim was that requiring members of the Eastern District bar to live or have an office in Louisiana violated the Fifth Amendment's Due Process Clause. This claim has two related elements to it.

The first relied on decisions which struck down state court residency requirements under the Privileges and Immunities Clause of Article IV, which provides that the "citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This Clause is a limit on state, not federal action. Petitioner nonetheless argued that, just as this Court has employed equal protection analysis to examine federal discrimination under the Due Process Clause of the Fifth Amendment, which contains no separate equal protection provision, it should also employ the analysis used in Privileges and Immunities Clause cases when local units of the federal government discriminate against non-residents in a manner which the states could not do under that Clause (Pet. App. 3a-4a, 39a-40a). His second contention was that Rule 21 was invalid under the equal protection component of the Due Process Clause, whether examined under a heightened level of scrutiny or the more deferential "rational basis" test (Pet. App. 4a-8a, 30a-39a).

Rule 21 was supported at trial by the testimony of two district judges, two magistrates and the clerk of the Eastern District. Their principal contention, as summarized by the court of appeals, was that "lawyers admitted *pro hac vice*, who neither reside nor maintain an office in Louisiana, fail to comply with the local rules and impede the efficient administration of justice more than members of the bar of the Eastern District" (Pet. App. 7a). They also stated that these lawyers were not "readily available, because of geographic separation from the court" (*id.*), and this was said to cause problems, particularly when hearings were required on short notice (Pet. App. 36a-37a).

The district court was persuaded by these arguments and upheld the Rule. It found no basis for examining Rule 21 using a Privileges and Immunities Clause analysis, adding that even if that analysis were appropriate, the exclusion of non-Louisiana lawyers was a valid means of achieving the court's goals (Pet. App. 39a-40a). Petitioner's equal protection claim was rejected on the ground that the rules were "substantially related to the important governmental objective of promoting the efficient administration of justice" (Pet. App. 39a).

A divided panel of the court of appeals affirmed. The majority, in an opinion written by Judge Politz and joined by Judge Jolly, declined to assess the local rules using Privileges and Immunities Clause analysis, explaining that Rule 21 had been adopted by the judges of the Eastern District pursuant to rulemaking power delegated to the district courts by Congress, and that since petitioner was a citizen of the United States with representatives in Congress, he did not need the protection that Article IV extends to out-of-staters injured by discriminatory state action (Pet. App. 3a-4a).

The majority also rejected petitioner's equal protection claim. It found that the discrimination at issue here did not warrant heightened scrutiny and held that the exclusion was rationally related to the district court's goals of promoting lawyer competence and availability for hearings (Pet. App. 4a-8a). The majority stated: "We harbor no doubt that the Eastern District's

rules are as overinclusive in lumping all non-residents together as they are underinclusive in lumping together all lawyers who reside or maintain offices in Louisiana" (Pet. App. 7a). It nonetheless held that the district court "acted in a reasonable manner in drawing the distinction" (Pet. App. 7a) and found that the challenged Rule bore a "rational relationship to that court's goal of an efficient administration of justice" (Pet. App. 8a). In reaching its conclusions, the majority mentioned in passing this Court's decision in *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), which was decided while this case was pending in the court of appeals; the majority did not, however, explain why the justifications which were rejected there were acceptable here (Pet. App. 3a, 8a).

The majority added that out-of-staters were not unduly disadvantaged by this restriction, since they could affiliate with Louisiana counsel and appear *pro hac vice* (Pet. App. 7a-8a). It also denied petitioner's alternative request to invalidate these rules using the court of appeals' supervisory power over the district courts in that circuit (Pet. App. 8a-9a).

Judge Goldberg dissented, finding that the local rules could not withstand "even the most deferential judicial review" (Pet. App. 10a). He regarded much of the trial testimony as "general, visceral reactions and vague, anecdotal reminiscences" about *pro hac vice* practitioners which did not "rise to the level of legally probative evidence . . ." (Pet. App. 19a). In his view, the district court's experience with *pro hac vice* lawyers did not provide a proper basis for excluding out-of-state lawyers who sought *general* admission to the Eastern District bar. The latter applicants stand on a different footing because they "will have invested considerably more time and money to practice in the Eastern District on a continuing basis than those admitted on a *pro hac vice* basis," *i.e.,* they are interested in "developing an ongoing and regular practice" in the Eastern District; they will have taken and passed the Louisiana state bar examination; and they will be obliged to pay Louisiana bar dues (Pet. App. 17a). A petition for rehearing, with suggestion for rehearing *en banc,* was denied without opinion (Pet. App. 20a-21a), and the petition for certiorari was granted on 17 November 1986.

SUMMARY OF ARGUMENT

Following this Court's decision in *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), a state court may not adopt a rule such as Rule 21, which limits membership in its bar to lawyers who live or maintain an office in that state. The rationale of *Piper* and other decisions of this Court establish that the Due Process Clause of the Fifth Amendment precludes federal district courts from adopting similar rules. As *Piper* made clear, one's fitness to practice law in state court does not turn on the location of one's home or office, and there is no reason to believe that the only lawyers who are qualified to practice in a federal district court are the ones who live or have an office in the state where that court sits, as Rule 21 requires.

Nor, as *Piper* indicated, is there any reason to believe that in-state lawyers will be more aware of local rules and practices than out-of-state lawyers who intend to practice there on a regular basis, or that they will be more readily available or more disposed to attend hearings on short notice than out-of-state lawyers. The latter point is particularly true here, since the Eastern District admits to its bar Louisiana lawyers who reside up to 300 miles from New Orleans, while excluding out-of-state lawyers such as petitioner, who live and work considerably closer to the courthouse. Although the Privileges and Immunities Clause is a limit on state action, the Court should decide this case by importing the analysis developed in cases construing that Clause into the Due Process Clause, just as it has used equal protection analysis to scrutinize federal discrimination under the Due Process Clause. There is no reason for allowing federal district courts, exercising delegated authority, to discriminate against out-of-staters in a manner that would be unlawful if attempted by state courts. Neither respondents nor the courts below have shown that federal judges have any special needs which differ from those of state court judges and which are remedied by rules such as Rule 21.

Rule 21 is also invalid under the equal protection component of the Due Process Clause. Because this discrimination is aimed

at out-of-staters, the Court should utilize strict or at least intermediate-level scrutiny, but even if the most deferential level of scrutiny is employed, Rule 21 still cannot stand. The Rule was defended as necessary to deal with problems experienced with out-of-state lawyers appearing *pro hac vice*. Whatever difficulties these occasional practitioners may cause, the solution is not a blanket exclusion of out-of-state lawyers who seek *general* admission to a district court bar. And despite all the complaints about *pro hac vice* practitioners, the evidence also indicated that *pro hac vice* appearances are granted "as a matter of course" in the Eastern District (Pet. App. 7a), a practice that wholly undermines the reason given for automatically excluding out-of-staters from the Eastern District bar.

Finally, the Court should invalidate these rules under its supervisory authority over the lower federal courts. With the growth of interstate practice and the increasing specialization in the bar, local rulemaking bodies should not be permitted to exclude out-of-state lawyers, and bar admission rules should accommodate not only the interests of local judges and lawyers, but also the interests of out-of-state lawyers and their clients.

ARGUMENT

I. RULE 21 VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. A State Court Could Not Constitutionally Exclude Petitioner From Its Bar Based on Rule 21.

In *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), this Court invalidated a state court rule which required persons seeking admission to a state bar to live in the state at the time of their admission. The rule was defended on several grounds, including claims that nonresidents were less likely than residents (1) to be familiar with local rules and practices and (2) to be available for court proceedings. *Id.* at 285. This Court held the rule invalid under the Privileges and Immunities Clause of Article IV because there was no "substantial reason for the difference in treatment," nor did the exclusion bear "a substantial relationship to the State's objective." *Id.* at 284.

With respect to the competency claim, the Court found no reason to assume that "a nonresident lawyer – any more than a resident – would disserve his clients by failing to familiarize himself with the rules." *Id.* at 285. The Court also rejected the availability argument, noting that: "Even the most conscientious lawyer residing in a distant State may find himself unable to appear in court for an unscheduled hearing or proceeding." *Id.* at 286. It added: "In many situations, unscheduled hearings may pose only a minimal problem for the nonresident lawyer," noting the increased use of conference telephone calls "as an expeditious means of dispatching pretrial matters." *Id.* at 286 n.21.

Petitioner is in essentially the same situation as the applicant in *Piper*, a Vermont resident who sought admission to the New Hampshire bar. He lives and practices across the state line from the Eastern District of Louisiana, and he is considerably closer to the courthouse in New Orleans than some members of that court's bar. His competence in the law has been tested to the same extent as that of Louisiana lawyers, and he has been found qualified. Nonetheless, he is denied admission to the Eastern District bar, and the only reason for his exclusion is the fact that he neither lives nor has an office in Louisiana.[1]

It is clear that if Rule 21 were a state court rule, it would be invalid under *Piper*. That decision forecloses any argument that nonresidents, as a class, are less qualified than resident lawyers. Nor, after *Piper*, could a state court conclude that Louisiana lawyers, as a class, are more likely to attend hearings in New Orleans than out-of-staters. Yet Rule 21 conclusively presumes that a lawyer in Shreveport, which is more than 300 miles from

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[1] Because petitioner passed the Louisiana state bar examination, as required by Rule 21.2, this case does not present the question of whether a federal district court may limit membership in its bar to those lawyers who have been admitted to the bar of the state where the district court sits. While some district courts impose such a requirement, others require only membership in good standing in some state bar. The former type of rule was upheld in *Matter of Roberts*, 682 F.2d 105 (3d Cir. 1982), but a later opinion stated that such a condition may be "suspect after *Piper*." *Mutton v. Disciplinary Panel*, 758 F.2d 1362, 1367 (10th Cir. 1985).

New Orleans, is more likely or more able to attend a hearing in that city than a lawyer such as petitioner, who is only 110 miles from New Orleans, but on the "wrong" side of the state line.

In relying on *Piper*, petitioner recognizes that there are two arguable distinctions between the rule there and Rule 21, but neither of them alters the outcome here. First, the Eastern District imposes a continuing residence/office requirement, while the rule in *Piper* required residence only at the time of admission to the bar. However, there is no basis to suggest that the rule in *Piper* would have been upheld had it been more restrictive. The problem with the rule there was that it swept too broadly in its exclusionary features, and making it harsher would hardly have remedied the situation.

Nor does it matter that *Piper* imposed only a residency requirement while Rule 21 gives nonresidents the option of opening an in-state office. The logic of the Court's discussion regarding in-state residency applies with equal force to an in-state office requirement, as Justice White recognized in his concurring opinion. 470 U.S. at 289. The fact that a state or other unit of government adopts a discriminatory classification and then offers those affected an alternative way to achieve their goal does not immunize the classification from scrutiny under the applicable constitutional standard. For example, *Piper* noted that nonresident lawyers were not foreclosed from practicing in New Hampshire because they could appear there *pro hac vice*, but that option did not erase the fact that they were treated differently from state residents. *Id.* at 277 n.2. And in *Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979), the New York Court of Appeals struck down a rule requiring bar applicants to live or work full-time in the state. This in-state practice option, which amounted to a requirement that was imposed on nonresidents, but not on residents, did not save the rule from invalidation under the Privileges and Immunities Clause. 48 N.Y.2d at 269 & n.1, 397 N.E.2d at 1310 & n.1, 422 N.Y.S.2d at 642 & n.1.

This Court has taken a similar approach in an equal protection context. In *Mississippi University for Women v. Hogan*, 458

U.S. 718 (1982), the Court struck down a statute excluding a male applicant from an all-female nursing school. Although the applicant had the option of attending another state school, albeit at a considerable distance from his home, the Court noted that the statute placed burdens on him that would not be placed on women in a similar situation. *Id.* at 723-24 n.8. *See also Harman v. Forssenius*, 380 U.S. 528, 540-42 (1965) (poll tax invalidated even though statute provided affected voters with a burdensome option by which they could avoid paying tax).

Accordingly, there can be no doubt that if a state court denied petitioner admission to its bar based on Rule 21, he would prevail under *Piper*. Respondents can prevail, therefore, only if federal courts have more freedom to discriminate under the Due Process Clause of the Fifth Amendment than state courts have under the Privileges and Immunities Clause of Article IV. In the discussion below, we will demonstrate why Rule 21 cannot be sustained under the Due Process Clause. In section B we will show why this Court should invalidate this rule using a heightened level of scrutiny similar to that employed in privileges and immunities cases and in certain equal protection contexts. In section C we will show why, regardless of which standard is employed, the exclusion of out-of-state lawyers is unconstitutional.

B. Heightened Scrutiny Should Be Employed Here.

In a series of early cases, this Court noted that the Fifth Amendment does not contain a provision comparable to the Equal Protection Clause of the Fourteenth Amendment; however, it identified an equal protection component in the Due Process Clause of that Amendment, stating that some "discriminatory legislation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment." *Detroit Bank v. United States*, 317 U.S. 329, 338 (1943). *See also Currin v. Wallace*, 306 U.S. 1, 13-14 (1939); *Steward Machine Co. v. Davis*, 301 U.S. 548, 583-85 (1937); *Farrington v. Tokushige*, 273 U.S. 284, 298-99 (1927); *LaBelle Iron Works v. United States*, 256 U.S. 377,

391-93 (1921); *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, 24-25 (1916).

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court explained its reasoning as follows:

> [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Id. at 499 (footnote omitted). In subsequent cases, the Court modified this language so that today, equal protection analysis under the Fifth Amendment is generally "the same as that under the Fourteenth Amendment," *Buckley v. Valeo*, 424 U.S. 1, 93 (1976), consistent with the notion that "[t]he federal sovereign, like the States, must govern impartially." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). *See generally* Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. Rev. 541, 547 (1977) (analysis in these cases "amply justified by text, by structure and by history").[2]

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[2] This does not mean that if a federal law and a state law both discriminate between two groups in the same manner, a reviewing court will uniformly uphold or set aside those laws. There may be instances where federal interests are strong enough to uphold the classification, but state interests are not, for example, if there are "overriding national interests which justify selective federal legislation that would be unacceptable for an individual State" or if "a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved." *Hampton v. Mow Sun Wong, supra*, 426 U.S. at 100. The first exception is implicated when, as in *Hampton*, the classification involves questions of immigration and naturalization, which the federal government is solely empowered to regulate under Article I, § 8 of the Constitution and where the federal government can discriminate against aliens in ways that are denied to the states. *Compare Hampton* with *Sugarman v. Dougall*, 413 U.S. 634 (1973). The second exception, involving U.S. territories and the District of Columbia, also implicates powers reserved to the federal government under Article IV, § 3 and Article I, § 8. Suffice it to say, no comparable federal interest is at stake here.

In subsection 1, we explain why the interests that persuaded the Court to adopt a heightened level of scrutiny when examining state laws under the Privileges and Immunities Clause should persuade it to employ that analysis when, as here, a local unit of the federal government, exercising delegated authority, practices discrimination against out-of-staters that would be unconstitutional if attempted by a state. Then, in subsection 2, we explain why comparable reasons for employing a level of scrutiny beyond the "rational basis" standard used in certain equal protection cases should convince the Court to examine the reasons offered in defense of Rule 21 on a stricter basis also.

1. Privileges and Immunities Clause Analysis.

The ideals of fairness and equal treatment of outsiders which inhere in the Privileges and Immunities Clause are no less present in the Due Process Clause of the Fifth Amendment. Nor are the guarantees of equal treatment which are secured by the Privileges and Immunities Clause any less important when the discrimination in question is practiced by a unit of the federal government rather than a unit of state government. Article IV, § 2 of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This Clause was intended to "fuse into one Nation a collection of independent, sovereign States" and to "insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)(footnote omitted).

As the Court explained in *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975): "During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread. The fourth of the Articles of Confederation was intended to arrest this centrifugal tendency with some particularity." While the "discriminations at which this Clause was aimed were by no means eradicated during the short life

of the Confederation," the provision "was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation." *Id.* at 660-61 (footnotes omitted). *See also Paul v. Virginia,* 75 U.S. (8 Wall.) 168, 180 (1869)("no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this").

The Clause applies "only with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity." *Baldwin v. Montana Fish & Game Comm'n,* 436 U.S. 371, 383 (1978). This category includes "the pursuit of a common calling," and indeed, many of this Court's Privileges and Immunities Clause cases "have dealt with this basic and essential activity." *United Building & Construction Trades Council v. Mayor & Council of Camden,* 465 U.S. 208, 219 (1984). *See, e.g., Hicklin v. Orbeck,* 437 U.S. 518 (1978); *Toomer v. Witsell, supra; Ward v. Maryland,* 79 U.S. (12 Wall.) 418 (1871). After *Piper,* it is clear that the opportunity to practice law is embraced by this Clause.

Because of the important role which this Clause serves in maintaining the cohesiveness of the union, this Court has held that state efforts to favor their own residents at the expense of nonresidents must be subjected to exacting scrutiny. Thus, in *Toomer v. Witsell, supra,* the Court allowed discrimination against nonresidents only if they were "a peculiar source of the evil" at which the statute was aimed, 334 U.S. at 398, such that there might be a "substantial reason" for discriminating against them. *Id.* at 396. As restated in *Piper,* the Clause allows discrimination against nonresidents only where "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." 470 U.S. at 284. Consideration of the second element includes examining "the availability of less restrictive means." *Id. Accord, Hicklin v. Orbeck, supra,* 437 U.S. at 528 (means selected must be "more closely tailored" to goal than

a flat ban on out-of-staters). There are a number of reasons why Rule 21 should be scrutinized under the analysis developed in these Privileges and Immunities Clause cases. In the first place, to do otherwise would undermine a major goal of the framers in this area. The establishment of a new federal court system—particularly inferior federal courts which would co-exist with state courts—was not without controversy. *See generally* 1 J. Goebel, Jr., History of the Supreme Court of the United States 206-50, 280-91 (1971). *See also* M. Farrand, The Framing of the Constitution of the United States 79-80, 154-55 (1913). In Federalist No. 80, Hamilton defended the creation of a federal court system, citing as one reason the discrimination against out-of-staters much in evidence at the time and arguing that federal courts were needed to counteract that trend by enforcing the Privileges and Immunities Clause, which he termed the "basis of the Union." He argued that federal judges, as officers of the federal government and "having no local attachments, will be likely to be impartial between the different States and their citizens. . . ." The Federalist No. 80, at 537-38 (J. Cooke ed. 1961). This belief is reflected in Article III, § 2, which extends the federal judicial power to include cases involving diversity of citizenship. *See* 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3502, at 4-7 (1984). It would be ironic if federal courts, which the framers intended to guard against the provincialism which bedeviled the new nation, could discriminate against out-of-staters in a manner that is denied to the states. Yet such a prospect is likely if local rules of practice in federal courts are analyzed more leniently than similar rules adopted by state courts.

An instructive case is *Hurd v. Hodge,* 334 U.S. 24 (1948), which was the companion case to *Shelley v. Kraemer,* 334 U.S. 1 (1948), and which held that restrictive covenants in the District of Columbia were illegal under the Civil Rights Act and the "public policy" of the United States. The Court's reasoning, though not constitutionally grounded, is useful here:

> It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action [*i.e.*, enforcing restrictive covenants] denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States.

Id. at 35-36 (footnotes omitted).

The same logic applies here as well. Indeed, what is notably absent from the opinions below and the briefs filed on behalf of respondents is an attempt to explain why it makes sense to burden federal practitioners with restrictions which would be unconstitutional if imposed by a state court. Certainly, state trial judges are no less concerned than federal district judges with the competence and availability of the lawyers who appear before them. And state trial judges, no less than federal district judges, must move the cases on their dockets expeditiously. Yet the court of appeals never articulated why federal courts have any special needs in this area which set them apart from state courts and which are remedied by rules such as Rule 21.

If allowed to stand, the decision below could mean that a lawyer's decision on whether to file a case in state or federal court will turn on where the lawyer is licensed to practice, not which forum is best for the client's interests. In addition, the decision might increase efforts of some litigants to seek a federal forum in order to put their adversary at a disadvantage. Suppose, for example, that petitioner filed a case in state court in New Orleans. Opposing counsel might then remove the case to the Eastern District in order either to disqualify petitioner from representing his client or to require him to affiliate with a Louisiana lawyer and appear *pro hac vice.* Or a lawyer who knows that his adversary's principal lawyer is

from another state may initially file in federal court in order to achieve the same end. Apart from the unfair tactical advantages which Rule 21 gives to local lawyers, it makes no sense to assume that a lawyer's ability to handle a case diminishes if the case is to be tried not in state court, but across the street in federal court, when that assumption rests entirely on the fact that the lawyer's home and office are in another state.

If anything, the arguments against such rules are stronger in the context of federal court practice than they are in the area of state court practice, where laws and procedures may differ substantially from state to state. *Cf. Piper, supra,* 470 U.S. at 290-91 (Rehnquist, J., dissenting). District court practice is governed by the Federal Rules of Civil Procedure, Criminal Procedure and Evidence, which do not vary from state to state or even region to region. Indeed, the motive force behind adoption of federal rules was the considerable dissatisfaction with the Conformity Act of 1872, which required each district court to follow the rules of procedure in effect in the state where that court sat. Act of 1 June 1872, ch. 255, § 5, 17 Stat. 197. *See* J. Weinstein, Reform of Court Rule-making Procedures 55-69 (Ohio State Univ. Press 1977). To the extent that local rules may vary from district to district, that is not a valid basis for excluding out-of-staters from a district court's bar, as there are far less restrictive ways of informing the bar of what is expected of them. *See* note 5, *infra.* Moreover, such variations will likely lessen in the future as a result of the 1985 amendment to Rule 83 of the Federal Rules of Civil Procedure, which gives more control over local rulemaking to the Judicial Council in each circuit and which should bring about more inter-district uniformity, at least in each circuit.[3]

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[3] The advisory committee note accompanying the new Rule 83 expressed the expectation that the judicial councils "will examine all local rules, including those currently in effect, with an eye toward determining whether they are valid and consistent with the Federal Rules, promote inter-district uniformity and efficiency, and do not undermine the basic objectives of the Federal Rules." This amendment

The majority opinion's analysis of this point was brief and unsatisfactory. After noting that Congress had delegated rulemaking authority to the federal district courts under 28 U.S.C. §§ 1654 and 2071 (Pet. App. 3a), the majority simply asserted, without citation of authority, that this delegation empowered "federal officers [to] adopt policies and rules which discriminate against citizens of some states, and benefit citizens of others" (Pet. App. 4a). Based on that assumption, the majority concluded that since petitioner enjoyed representation in Congress, which had delegated this authority in the first place, he "is not a powerless outsider in need of the protection of the privileges and immunities clause" (Pet. App. 4a).

The problem with that analysis is that it equates representation in Congress, which petitioner enjoys, with representation among the judges of the Eastern District, which he does not enjoy. These rules were adopted by the district court in New Orleans, with the advice of local lawyers, a process in which out-of-state lawyers are powerless. The restrictions in Rule 21 may be satisfactory to local judges and local lawyers, but they fail to accommodate the legitimate interests and needs of out-of-state lawyers, as well as the clients who seek to retain them. In a related context, this Court declined to uphold a federal rule, adopted pursuant to delegated authori-

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responds to the criticism voiced by commentators that local rulemaking has proliferated far beyond what was contemplated by the draftsmen of the Federal Rules of Civil Procedure and far beyond what is desirable for federal court practice. The Rules were intended to promote simplicity and uniformity in federal practice, with local rules limited to such housekeeping details as whether the clerk's office would be open on Saturday and the order of calling cases on the trial calendar. Instead, most district courts have promulgated dozens of local rules (plus standing orders issued by individual judges) that do not simply fill in these gaps, but rather seek to regulate a variety of subjects already addressed in the federal rules, sometimes in an inconsistent manner. The resulting variations in practice can impede efficient handling of litigation and can be a snare even for the most conscientious counsel. *See* 12 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 3152, at 217-23 (1973); Note, *Rule 83 and the Local Federal Rules*, 67 Colum. L. Rev. 1251, 1252-63 (1967); Comment, *The Local Rules of Civil Procedure in the Federal District Courts – A Survey*, 1966 Duke L.J. 1011.

ty, which discriminated against aliens, despite arguments that the federal government enjoyed plenary authority in the field. *Hampton v. Mow Sun Wong, supra,* 426 U.S. at 101-03. Therefore, it is no answer to say that because Congress delegated rulemaking power to a unit of the federal government, Congress meant to authorize that entity to issue discriminatory rules of the sort that would be set aside if adopted by a state, let alone that the delegation brought with it an immunity from any heightened scrutiny that would otherwise be applied.

For these reasons, Rule 21 should be examined under the heightened Privileges and Immunities Clause standard set forth in *Toomer* and *Piper* or, for reasons to which we now turn, under analogous standards which the Court has used in equal protection cases.

2. Equal Protection Clause Analysis.

The "general rule" under equal protection analysis is that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Center,* 105 S. Ct. 3249, 3254 (1985). The Court has, however, "treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" *Plyler v. Doe,* 457 U.S. 202, 216-17 (1982)(footnotes omitted). Thus, classifications based on race, alienage or national origin are "subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest"; similar scrutiny is also applied if the law impinges "on personal rights protected by the Constitution." *City of Cleburne, supra,* 105 S. Ct. at 3255. *See also San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 16-17 (1973).

An intermediate level of scrutiny is warranted in examining classifications which, "while not facially invidious, nonetheless give rise to recurring constitutional difficulties."

Plyler v. Doe, supra, 457 U.S. at 217. In those situations, the Court has "sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." *Id.* at 217-18 (footnote omitted). Classifications based on such factors as gender or illegitimacy are examined under this standard and are invalidated unless they are "substantially related" to a "sufficiently important" or "legitimate state interest." *City of Cleburne, supra,* 105 S. Ct. at 3255. *See also Mississippi University for Women v. Hogan, supra,* 458 U.S. at 724-25; *Craig v. Boren,* 429 U.S. 190, 197-98 (1976). Heightened scrutiny is employed because these classifications may be based on "outmoded notions" of the capabilities of the persons affected or on reasons which bear "no relation to the individual's ability to participate in and contribute to society." *City of Cleburne, supra,* 105 S. Ct. at 3255, quoting *Mathews v. Lucas,* 427 U.S. 495, 505 (1976). In addition, there may be a historical pattern of unequal treatment of the affected group or discrimination based on "stereotyped characteristics not truly indicative of their abilities." *Id.*, quoting *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313 (1976). *See also Lyng v. Castillo,* 106 S. Ct. 2727, 2729 (1986).

Rule 21, which discriminates against otherwise qualified lawyers on the basis of their status as out-of-staters, should be subjected to strict scrutiny or at least an intermediate level of review. With respect to strict scrutiny, *Piper* held that "the opportunity to practice law should be considered a 'fundamental right'" for purposes of Article IV. 470 U.S. at 281. Should the Court find that the opportunity to practice law is not a "fundamental right" for equal protection purposes, the discrimination at issue here should still be subject to heightened scrutiny since out-of-staters bear many of the earmarks of a "suspect class." As the historical discussion indicated (at 14-16), there was an ingrained practice of local favoritism which the framers sought to eradicate, yet which continues to this day. Moreover, out-of-staters constitute a

discrete minority which is not represented when, as here, discriminatory rules are fashioned by local councils of federal officials. *Cf. Kramer v. Union Free School District,* 395 U.S. 621 (1969). Finally, one's status as an out-of-stater, if not as immutable a characteristic as race or national origin, may be no less immutable than alienage, and the Court has employed strict scrutiny to invalidate various state laws discriminating against aliens, including a court rule excluding them from admission to a state bar. *In re Griffiths,* 413 U.S. 717 (1973).[4]

Even if these factors do not support the conclusion that classifications involving out-of-staters should be regarded as "suspect," they warrant at least intermediate-level scrutiny. The assumptions made in Rule 21 about the "relative capabilities" of out-of-state lawyers are replete with the sort of "outmoded notions" and "stereotyped characteristics" which have prompted the Court to use this level of review in other contexts. *City of Cleburne, supra,* 105 S. Ct. at 3255. And because this case involves a rule adopted by a federal court, the constraints which federalism and separation of powers normally place on a court contemplating close scrutiny of a state classification, particularly one made by a legislative body that is democratically chosen, are not present here. *Id.* Indeed, the issue presented here is uniquely within this Court's province as the highest court in our federal system. *See also* Part II, *infra.*

As the preceding discussion indicates, there is some overlap in the standards developed under the Privileges and

[4] Like lawful resident aliens, who generally have the option of becoming United States citizens, out-of-staters have the option of locating in a new state, thus reaping any benefits reserved to in-staters. In none of this Court's equal protection cases has the fact that an alien could change his or her citizenship played a role in deciding whether to treat alienage as a suspect classification. *See, e.g., Sugarman v. Dougall, supra; Bernal v. Fainter,* 467 U.S. 216 (1984). So too in this case, regardless of how many lawyers move to Louisiana or start a practice there, there will always remain a large class of out-of-staters still subject to Rule 21. In addition, the site of one's residence or office, like one's citizenship, is often exclusive. Thus, moving to Louisiana might solve petitioner's problem with respect to the Eastern District, but he would then be excluded from other district courts with rules comparable to Rule 21.

Immunities and Equal Protection Clauses, given the similarities in their core purpose of equal treatment. While there are also some differences, we do not believe that in this case, where even the majority opinion conceded that Rule 21 was both overinclusive and underinclusive (Pet. App. 7a), those differences should alter the outcome. Indeed, we believe that, especially in light of *Piper*, Rule 21 is so utterly irrational that it must fall regardless of which level of scrutiny is employed. Accordingly, in order to avoid repeating the same arguments in the context of different standards of review, the next subsection establishes that Rule 21 cannot be upheld no matter which test is applied.

C. The Exclusion of Out-of-Staters Cannot Be Sustained Under Any Level of Scrutiny.

The exclusion of lawyers who have neither a home nor an office in Louisiana was defended below primarily on the theory that in-state lawyers are more familiar with local practice and are more likely to attend court proceedings, especially those held on short notice. However, there is no "substantial" reason for making that classification, nor does it bear any "substantial relationship" to the district court's objectives. *Piper, supra,* 470 U.S. at 284. Nor can it be said that this exclusion is "suitably tailored" or even "rationally related" to achieving its intended goals. *City of Cleburne, supra,* 105 S. Ct. at 3255.

Piper held that one's fitness to be admitted to a state court bar does not hinge on factors such as where the lawyer lives or has an office. There is no basis for concluding that such factors are more relevant in determining one's fitness to be admitted to a federal district court's bar, and even if they were, Rule 21 could not withstand even the most deferential scrutiny.

The principal problem with Rule 21 is that it is as overinclusive as it is underinclusive, as the majority below conceded (Pet. App. 7a). Competent practitioners are excluded from the Eastern District bar, while lawyers

who may have little or no trial experience or who may be located further from the courthouse than nonresidents may easily obtain a license. Beyond the geographic inequities noted at pages 3 and 9-10, *supra,* the following additional examples demonstrate how ill-suited Rule 21 is to achieving the goals attributed to it.

- Rule 21 conclusively presumes that a Louisiana resident is fully competent to litigate cases in the Eastern District—indeed, more capable than any attorney from outside Louisiana—even if that lawyer has never previously set foot in a courtroom. By contrast, Rule 21 denies many experienced litigators membership in the Eastern District bar, and the only way that out-of-state lawyers can handle a case there on their own is if they represent an out-of-state client for whom affiliation with Louisiana counsel would be a "hardship." *See* Rule 21.6 (App. 3a-4a; Pet. App. 46a-47a).
- If two equally qualified lawyers practice across the street from one another in a Mississippi city near the Louisiana border, and if one lives in Louisiana and the other in Mississippi, the former may be licensed to practice in the Eastern District, as well as in Mississippi courts, thus gaining an advantage when it comes to serving clients. Indeed, the first lawyer's status as a Louisiana resident enables him to be "local" counsel for other out-of-state lawyers, even though he may be no closer to New Orleans during working hours than they are.
- A lawyer in Port Arthur, Texas, can open a branch office or affiliate with a law firm across the state line in Louisiana, but still spend most of his or her time practicing in Texas. If that lawyer is a member of the Louisiana state bar, then he or she can be licensed in the Eastern District and can try cases in New Orleans, even though most of his or her time is spent in Texas. By contrast, a Mississippi lawyer such as petitioner—with an office less than half the distance to New Orleans—is excluded

from the Eastern District bar. Indeed, the Port Arthur lawyer can even serve as "local" counsel for the Pascagoula lawyer in the Eastern District, although it is difficult to see how the former is more readily available for hearings than the latter.

Petitioner in no way questions the right of a district court to adopt rules designed to assure that the members of its bar will serve clients and the court capably and responsibly. As these examples demonstrate, however, there is no basis for concluding that Rule 21 even remotely advances that goal. The reason for this lack of congruity is quite simple: the location of a lawyer's residence or office has nothing to do with a lawyer's ability to litigate cases in federal district court. There is no basis to assume that Louisiana residents will read advance sheets from the Eastern District more diligently than members of the Eastern District bar who happen to live in another state. Nor can one assume that by living or having an office somewhere in Louisiana, a lawyer is aware of the nuances of practice in the Eastern District, such that he or she can avoid any procedural pitfalls, as well as advise counsel appearing *pro hac vice* on how to do the same. Indeed, one of the complaints made at trial about *pro hac vice* lawyers was that they often file motions without noticing them for a hearing on a Wednesday, the "motions day" in that court. However, one of the magistrates testified that she experienced similar problems with lawyers who normally practice in Louisiana state court, where motions are not noticed for a hearing, and who assume that the practice in the Eastern District is the same as that in state court (Tr. 205).[5]

[5] To the extent that the Eastern District wishes to assure a high level of competency and familiarity with local rules, there are better ways to achieve that goal than a ban on out-of-staters. The rules could require, for example, that lawyers certify that they are and will continue to remain familiar with the Federal Rules of Civil Procedure, Criminal Procedure and Evidence, as well as local rules, with that requirement enforced through sanctions. The court could also require applicants to take an examination which tests a lawyer's familiarity with local rules and which focuses on those rules causing the most problems.

While the bar unquestionably has obligations to the district court, the court has concomitant obligations to make its local rules readily available and easy to follow.

Nor does an in-state residence or office assure that a lawyer is readily available for hearings on short notice. Rule 21 requires only that a lawyer live or work somewhere in the state of Louisiana, even if it is 300 miles from New Orleans. There is no basis for assuming that lawyers who are located 300 miles in one direction are fit to practice law, but lawyers who are located 100 miles in another direction are not. The irrationality of such a rule is highlighted by the fact that the lawyer who is 300 miles away can serve as "local" counsel in the Eastern District for the lawyer who lives only 100 miles away.

The court of appeals never came to grips with these anomalies, which seriously undermine any claim that these rules are effective in achieving their desired end. Instead, the majority opinion appears to rest on two grounds: (1) the problems which the Eastern District judges have experienced with out-of-state lawyers warrant their exclusion; (2) the restrictions they adopted are not unduly burdensome because out-of-staters can practice in the Eastern District on a *pro hac vice* basis. Neither argument withstands analysis.

As to the first point, the majority failed to focus on the fact that the criticisms were aimed almost exclusively at attorneys appearing *pro hac vice*. As the dissent pointed out, however (Pet. App. 17a), the experience with this category of one-time or occasional practitioners provides little basis for predicting the behavior of attorneys seeking to practice in the Eastern District on a regular basis. Thus, whatever steps may be appropriate to improve the performance of *pro hac vice* attorneys, the solution is not a rule denying out-of-state lawyers general admission to the Eastern District bar.

The second point—that out-of-state lawyers are not totally foreclosed from Eastern District practice because they can

As pointed out by the authorities cited in note 3, *supra*, a major criticism of local rules (and local practices often not set forth in the rules) is their great number, variety and complexity. Doubtless this situation prompts many of the complaints about non-compliance with local rules, but the proliferation of such rules, as well as standing orders and practices which are not written down or otherwise readily available, can trip up even the most careful lawyer.

appear *pro hac vice*—cannot be squared with the first one. It is said, on the one hand, that out-of-state lawyers appearing *pro hac vice* are so deficient in their knowledge of local rules, and so unwilling to appear on short notice, that they must be denied general membership in the Eastern District bar. At the same time, however, "applications for admission *pro hac vice* are granted as a matter of course in the Eastern District" (Pet. App. 7a). Surely, the proponents of Rule 21 cannot have it both ways.

As support for its conclusion, the majority also stated that the "requirement that local counsel be associated with an out-of-state lawyer appearing *pro hac vice* has been approved, albeit in *dicta,* by the Supreme Court" in *Piper* (Pet. App. 8a). This statement is, however, contradicted by *Piper,* which also noted the availability of a *pro hac vice* option for nonresidents, but which held the rule to be unconstitutional, adding that this option was a matter of discretion and did "not allow the nonresident to practice in New Hampshire on the same terms as a resident member of the bar." 470 U.S. at 277 n.2.[6]

The court of appeals' citation to *Piper* apparently refers to this Court's comment that a "trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and hearings." *Id.* at 287. Yet this citation overlooks the Court's clear ruling earlier in the paragraph that a lawyer's "great distance" from the trial court does not justify denying him or her general admission to that court's bar. *Id.* at 286-87. The same reasoning applies here with equal force.

Moreover, *Piper* indicated that joinder of local counsel may be appropriate only if lawyers are located at "a great

[6] While *pro hac vice* appearances may be liberally allowed in the Eastern District, that is not true elsewhere. Some district courts frown on lawyers who "frequently or regularly" file such applications (W.D.N.C. Rule 1-B), or they limit such applications to one a year (D.P.R. Rule 204.2; D.R.I. Rule 5(c)) or (seemingly) to once in a lifetime (N.D. Fla. Rule 4-D(1)).

distance" from the licensing jurisdiction. However that phrase may be defined elsewhere, it plainly does not apply to petitioner: if Shreveport or Lake Charles are not a "great distance" from New Orleans, then neither is Pascagoula, which is less than half as far. More generally, this Court's statement cannot be read as endorsing a local rule which establishes a local counsel requirement only for out-of-state lawyers because, as this case demonstrates, many in-state lawyers may be located a greater distance from New Orleans than out-of-state lawyers such as petitioner. And even if the Eastern District redrafted its rule to open membership in its bar to any qualified lawyer, but required the appearance in each case of a lawyer with an office in the Eastern District, the rule would still produce anomalies because some Eastern District lawyers are located further from New Orleans than is petitioner, even though he is located in another state (Pet. App. 7a n.6). Similar anomalies will occur whenever a metropolitan area straddles or is near a state line and a district court in state A requires local counsel whenever a lawyer from state B seeks to practice there.

It is important to recognize that many local counsel rules do not require that counsel really be truly "local," but only that he or she have an office somewhere in the state, regardless of the distance from the courthouse. It is difficult to see how a local counsel rule so imprecisely drawn could be said to advance a district court's goals. Moreover, many of the current district court rules require local counsel to do far more than "be available for unscheduled meetings and hearings." *Piper, supra,* 470 U.S. at 287. In a number of districts, local counsel must "participate meaningfully" in the case or have "full authority" to handle the litigation, among some of the more commonly used formulations.[7] *See generally* Misner, *Local Associated Counsel in the Federal District Courts: A Call for Change,* 67 Cor-

[7] For examples of the former, *see* D. Colo. Rule 301-B; D. Hawaii Rule 110-1(d); D. Ore. Rule 110-2(b); E. D. Wash. Rule 1(c). For examples of the latter, *see* D. Mont. Rule 110-2(c); D. Neb. Rule 5-F; M.D.N.C. Rule 103(d)(1); D.S.D. Rule 2, § 5(A); W.D. Va. Rule 4.

nell L. Rev. 345, 348-50 (1982). As a practical matter, it is doubtful that such rules really achieve their intended goals, simply because there are not that many clients who are willing to pay an out-of-state lawyer to handle a case and then pay a local lawyer to duplicate the principal lawyer's efforts. The effect of such rules, therefore, is to drive up the cost of litigation, not to mention steering business towards the local bar which could be capably performed by an out-of-state lawyer. *See* Misner, *supra,* 67 Cornell L. Rev. at 345, 372 & n.192; Comment, *supra,* 1966 Duke L.J. at 1019.

To the extent that a district court may be concerned about having counsel ready on short notice, there are far less restrictive means of achieving that end. Thus, a court may require counsel who are located "a great distance" from the courthouse to agree, when they enter an appearance in a case, to accept collect telephone calls from the court and opposing counsel and to appear at any unscheduled conference or hearing within a specified time, such as 48 hours. *See* S.D. Tex. Rule 1(G)(3). *See generally* Misner, *supra,* 67 Cornell L. Rev. at 357-59. And there is always the option of imposing sanctions on lawyers who fail to appear on schedule. Indeed, the Eastern District has adopted Rule 21.8.1, which specifically requires that sanctions be imposed on lawyers who fail to appear or appear extremely late at hearings (App. 4a-5a; Pet. App. 47a-48a), although it appears that this rule is enforced infrequently if at all (Tr. 196, 220-22, 252, 300).

For these reasons, then, Rule 21 cannot be sustained regardless of the level of scrutiny employed. It is so imprecise that it cannot be regarded as "suitably tailored" to serve a "compelling" interest of the district court, nor does it bear a "substantial" relationship to an "important governmental interest." *City of Cleburne, supra,* 105 S. Ct. at 3255. And even if heightened scrutiny is not used here, petitioner is still entitled to prevail. Illustrative is *City of Cleburne,* where the Court declined to use intermediate-level scrutiny to analyze an ordinance which

discriminated against the mentally retarded, but nonetheless invalidated the law using a deferential level of scrutiny.

Indeed, even under this "rational basis" standard, the Court in recent Terms has struck down a number of state laws favoring in-state residents at the expense of out-of-staters. In *Williams v. Vermont,* 472 U.S. 14 (1985), the Court considered the validity of a registration tax on cars for which Vermont residents received a credit if they purchased the car in another state and paid a sales tax there. However, nonresidents who bought a car in another state and paid sales tax there were not eligible for that credit if they moved to Vermont and registered their cars there. The Court rejected the state's arguments that the disparate approach could further such interests as making users of state highways pay for their upkeep, or enabling Vermont residents to shop outside the state without economic penalty, finding that the distinction which the state made between residents and nonresidents bore no relation to the asserted purposes. *Id.* at 21-27.

In *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869 (1985), the Court set aside another tax which sought to "give[ ] the 'home team' an advantage" by taxing out-of-state insurance companies at a higher rate than in-state insurance companies, emphasizing that "a State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence. . . ." *Id.* at 878. And in *Hooper v. Bernalillo County Assessor,* 105 S. Ct. 2862 (1985), the Court struck down a New Mexico law which granted Vietnam veterans a tax exemption if they lived in the state prior to 1976, but not if they moved into the state after that date. *See also Attorney General v. Soto-Lopez,* 106 S. Ct. 2317 (1986) (invalidating civil service preference for veterans who enlisted while living in the state, with the plurality opinion relying on "right to travel" authorities and the concurring opinions on *Hooper*).

Admittedly, there are factual differences between those cases and this one, but the state laws invalidated there were

no more precisely drawn than Rule 21. If anything, petitioner is in a stronger position than the plaintiffs in those other cases, as most of them involved challenges to tax laws, and this Court has expressed a strong reluctance to second-guess legislative judgments in the tax area. *See Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547-48 (1983); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

Accordingly, Rule 21 cannot pass constitutional muster, regardless of whether privileges and immunities analysis or equal protection analysis is employed, and regardless of which level of scrutiny is applied.

II. RULE 21 SHOULD BE INVALIDATED UNDER THIS COURT'S SUPERVISORY POWERS.

As a means of avoiding the constitutional issue, the Court could also set aside the restrictions in Rule 21 by exercising its supervisory power over the lower federal courts. On various occasions, this Court has been asked to use this power to set aside various local rules and practices. In some instances, the Court has reviewed a particular rule for consistency with the Constitution and applicable statutes or rules, *e.g., Wingo v. Wedding*, 418 U.S. 461, 472-74 (1974); *Colgrove v. Battin*, 413 U.S. 149, 161-64 (1973); *Miner v. Atlass*, 363 U.S. 641, 647-48 (1960). On other occasions, the Court has been asked to exercise its "[j]udicial supervision" over the lower courts for the purpose of "establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 332, 340 (1942); *see also Thomas v. Arn*, 106 S. Ct. 466, 470-71 & n.5 (1985); *Hobby v. United States*, 468 U.S. 339, 349-50 (1984); *United States v. Hasting*, 461 U.S. 499, 505-07 (1983).

In petitioner's view, this case is an appropriate one for the Court to resolve on non-constitutional grounds, by exercising its supervisory power to strike down Rule 21 and prescribe

standards in this area. Such an approach is consistent with 28 U.S.C. §§ 2071 and 2072, which vest rulemaking power over district court practice in both this Court and the district courts.

More importantly, as the previous discussion has demonstrated, the question of attorney admissions in today's federal court system involves interests that should not be left to local rulemaking bodies. For many years, of course, few lawyers were engaged in litigation outside their own localities. "Hence, historically, there was no great concern among the bar and judiciary as to the procedures for admission and discipline that were in vogue in 'foreign' jurisdictions." Agata, *Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 Hofstra L. Rev. 249, 250-51 (1975). Moreover, "even with respect to the processes of litigation (except for equity and admiralty), local federal courts, until one third of this century was history, were required to conform substantially to local state rules of procedure." *Id.* at 251.

In recent years, lawyers, as well as the population generally, have become more mobile. Lawyers no longer spend the bulk of their career practicing in a particular community, but may be called upon to serve clients in different cities and different states. Moreover, the increasing number and complexity of federal laws and the growth in federally protected rights have led to greater specialization in the bar and an increased demand for specialized legal services irrespective of state boundaries.

A number of distinguished commentators have noted this trend and have criticized the highly localized nature of bar admission requirements in both federal and state courts. Former United States Circuit Judge Malcolm R. Wilkey has urged the creation of a "United States Bar" whose members would be able to practice in any federal court. Of the current situation he wrote: "This highly individualized system of admission to federal practice, while no doubt reflecting local conditions within each district or circuit, does not encourage

the development of a consistently high, nationwide set of admission and practice standards." Wilkey, *Proposal for a United States Bar,* 58 A.B.A.J. 355, 356 (1972). In his essay, he quoted a statement made by former Chief Justice Warren E. Burger, who termed the current licensing practices in state and federal courts "a hodgepodge of standards for admission, and regulations that are desperately in need of careful re-examination." *Id.*

A former president of the American Bar Association, Chesterfield Smith, made a similar observation in the context of state licensing requirements:

> In every area of law practice there is an ever-increasing need for broadening, not narrowing, of the right of interstate practice. . . . The multioffice practice of law, both intrastate and interstate, already is a way of life . . . . Much of the daily routine of the average practitioner encompasses laws that are national in scope. It would be to the direct benefit of both the public and the legal profession for every state to allow qualified and experienced lawyers from other states, under proper regulation and registration, to practice law anywhere in the United States.

Smith, *Time for a National Practice of Law Act,* 64 A.B.A.J. 557, 558-59 (1978); *see also* Hafter, *Toward the Multistate Practice of Law through Admission by Reciprocity,* 53 Miss. L.J. 1 (1983)(proposing uniform standard for state bar admissions).

The growth in multi-state practice requires rules for district court practice which accommodate not only the interests of local judges and lawyers, but also out-of-state lawyers and their clients. Rules which condition bar membership on having a residence or office in the state where the district court sits are insensitive to these needs, although they may be satisfactory for local judges and lawyers. For the reasons set forth above, we urge the Court to adopt the approach taken in *Piper* and hold that such discriminatory rules are invalid and

that lawyers should be able to gain admission to a district court bar without regard to the site of their home or office.

To the extent that a local counsel rule may be deemed desirable, it should apply only to lawyers who are located "a great distance" from the courthouse, *Piper, supra,* 470 U.S. at 287, with provisions for waivers in appropriate cases. It should be narrowly tailored to fit the only legitimate justifications for such a rule, principally the need for counsel to handle true emergencies and the utility of a local office where papers can be served by hand if needed to expedite the litigation. Any other rationales for local counsel, such as their familiarity with local practice, can be addressed by far less burdensome means than are currently used in many districts. *See generally* Misner, *supra,* 67 Cornell L. Rev. at 350-59, 375-77, and note 5, *supra.*

Moreover, local counsel is not necessary or even desirable in every case; conference calls may be effectively used in many situations in lieu of in-court proceedings. *Piper, supra,* 470 U.S. at 286 n.21. In addition, requiring the presence of a second lawyer in a case can needlessly complicate the litigation. For example, the need to find local counsel may delay a party trying to file a case or intervene in one. *See Atkins v. State Board of Education,* 418 F.2d 874, 876 (4th Cir. 1969). In addition, there may be misunderstandings between the principal counsel and local counsel which result in local counsel taking actions which were not authorized and which have to be undone. *See Smith v. Widman Trucking and Excavating, Inc.,* 627 F.2d 792 (7th Cir. 1980). Local counsel may themselves be unfamiliar with local rules and may assume, for instance, that the principal lawyer is being served with a copy of court orders when that is not the case. *See Babich v. Clower,* 528 F.2d 293 (4th Cir. 1975). And even if local counsel does receive all orders and transmits them to principal counsel, the papers may get lost or delayed in the mail, and deadlines may be missed, to the detriment of all concerned. *See Baez v. S.S. Kresge Co.,* 518 F.2d 349, 350 (5th Cir. 1975), *cert. denied,* 425 U.S. 904 (1976).

A local counsel requirement also burdens the client, who should be free to choose between a local lawyer or an out-of-

town lawyer based on which lawyer can do a better job for the client. There may be valid reasons for choosing a local lawyer, *e.g.*, the lawyer may be more familiar with local conditions or, because of his or her location, may cost the client less in terms of travel and other expenses. On the other hand, there may be valid reasons for choosing a non-local lawyer, *e.g.*, the person selected is the client's regular lawyer who is most familiar with the client's business; the lawyer practices a specialty which is not available locally; or the client has an unpopular cause with which local lawyers are reluctant to be associated. *See Spanos v. Skouras Theatres Corp.*, 364 F.2d 168, 171 (2d Cir.)*(en banc), cert. denied,* 385 U.S. 987 (1966); *Piper, supra,* 470 U.S. at 281.

A client's choice of counsel is entitled to considerable respect, particularly in federal courts, where substantive laws and rules of procedure do not vary to the extent they do in state courts. District court rules requiring the presence of local counsel can have the effect of steering business towards local attorneys and penalizing clients who prefer to hire someone else. If, after consideration of the relevant factors, the client chooses to retain a non-local attorney, that decision should not be burdened by rules requiring the client to hire a local attorney as well, absent a very good reason for doing so. *See, e.g.*, Misner, *supra,* 67 Cornell L. Rev. at 376 (local counsel should be associated only if there is "at least one substantial instance of unavailability of counsel").

For these reasons, as well as those stated in the previous argument, Rule 21 should be invalidated in the exercise of this Court's supervisory powers.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,
Cornish F. Hitchcock
(Counsel of Record)
Alan B. Morrison
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704
*Attorneys for Petitioner**

Of counsel:
Gary L. Roberts
Roberts and Clark
P.O. Box 237
Pascagoula, Miss. 39567
(601) 762-7104

January 1987

* Counsel acknowledge the assistance of B. Carlton Grew, a law student at Northeastern University School of Law, in the preparation of this brief.

APPENDIX A

PERTINENT CONSTITUTIONAL PROVISIONS AND RULES

The Fifth Amendment to the United States Constitution reads in pertinent part:

No person shall. . . be deprived of life, liberty, or property, without due process of law. . . .

* * *

Rule 21 of the Rules of the United States District Court for the Eastern District of Louisiana reads in pertinent part:

RULE 21. ATTORNEYS.

21.1. *Roll of Attorneys.* The bar of this court consists of those lawyers admitted to practice before this court who have taken the prescribed oath and signed the roll of attorneys for this district.

21.2. *Eligibility.* Any member in good standing of the bar of the Supreme Court of Louisiana who resides or maintains an office for the practice of law in the State of Louisiana is eligible for admission to the bar of this court.

21.3. *Procedure for Admission.*

a. Each applicant for admission to the bar of this court shall file with the clerk a written petition signed by him and endorsed by two members of the bar of this court listing the applicant's residence and office address, his general and legal education, the courts that have admitted him to practice, and stating that the applicant is qualified to practice before this court, is of good moral character, and is not subject to any pending disbarment or professional discipline procedure in any other court. If the applicant has previously been subject to any disciplinary pro-

ceedings, full information about the proceedings, the charges and the result will be given.

b. The petitioner may then be admitted upon motion of a member of the bar of this court made in open court or in chambers, and upon taking an oath to conduct himself as an attorney or counsellor of this court uprightly and according to law and to support the Constitution of the United States. He shall then, under the direction of the clerk, sign the roll of attorneys and pay the fee required by law. Unless such a motion for admission is made within 6 months of the filing of the petition, the clerk may destroy the petition and a new petition will be necessary before the applicant can be admitted.

21.3.1. *Continuing Eligibility.* In order to continue as a member of the bar of this Court, an attorney must continuously and without interruption reside or maintain an office for the practice of law in the State of Louisiana.

An attorney admitted to practice before this Court, but who does not continuously qualify as set out herein, shall notify the Court within 30 days following termination of his qualifications that he desires to withdraw from the practice in this Court or that he desires a hearing to show cause why he should be permitted to continue to practice, though not qualified under the residence or office requirements of the rules.

An attorney who is not qualified to practice before this Court on the effective date of this rule (as amended), having previously failed to maintain the residence or office requirements of the rule, shall be allowed 90 days within which to notify the Court of his election to withdraw from practice in this Court or to request a hearing as described above.

At the time an attorney files the annual statement pursuant to the Rules of Disciplinary Enforcement of this Court, if the attorney has changed his residence or office address since the time of filing the previous annual statement, he shall certify that he is still qualified to practice before this Court pursuant to the requirements set out herein.

21.4. *Attorney Representation.* In all cases before this court, any party who does not appear in proper person must be represented by a member of the bar of this court, except as set forth below.

21.5. *Visiting Attorneys.* Any member in good standing of the bar of any court of the United States or of the highest court of any state, who is ineligible to become a member of the bar of this court, may, upon written motion of counsel of record who is a member of the bar of this court, by ex parte order, be permitted to appear and participate as co-counsel in a particular case.

The motion must have attached to it a certificate of the presiding judge or clerk of the highest Court of the State, or Court of the United States, where he has been so admitted to practice, showing that the applicant attorney has been so admitted in such Court, and that he is in good standing therein.

The applicant attorney shall state under oath whether any disciplinary proceedings or criminal charges have been instituted against him, and if so, full information about the proceedings or charges and the results thereof shall be disclosed.

An attorney thus permitted to appear may participate in a particular action or proceeding in all respects, except that all documents requiring a signature of counsel for a party may not be signed solely by such attorney, but must bear the signature also of local counsel with whom he is associated.

Local counsel shall be responsible to the Court at all stages of the proceedings.

Designation of the visiting attorney as "Trial Attorney," pursuant to Rule 2.3 herein shall not relieve the local counsel of the responsibilities imposed by this Rule.

21.6. *Waiver by Court Order of Requirements for Local Counsel.* In any civil action a non-resident counsel meeting the criteria of Rule 21.5 may be authorized by court order to appear and act for any party who is a non-

resident of the State of Louisiana without joinder of local co-counsel when it is shown that:

a. the non-resident party would suffer hardship by joinder of local counsel, and

b. the obligations and duties of counsel in the particular litigation will be fulfilled.

21.7. *Familiarity with and Compliance with Rules.* Everyone who appears in court in proper person and every attorney or student permitted to practice in this court shall be familiar with these rules. Willful failure to comply with any of them, or a false certificate of compliance, shall be cause for such disciplinary action as the court may see fit, after notice and hearing.

21.8. *Suspension—Disbarment—Discipline.* [Repealed]

21.8.1. *Counsel's Failure to Appear.* Counsel's failure to appear, or appearing only extremely late, for conferences with the court or its magistrates, or for the argument of motions, trial, or any other proceeding causes great inconvenience to the court and opposing counsel, and in some instances to witnesses and jurors. Accordingly, it will be the court's policy to impose costs or sanctions as follows:

a. For failure to appear, or appearing extremely late at any proceeding before any of the judges or magistrates, when the lawyer has been given timely notice of the conference or hearing, and has failed in advance of it to seek a continuance, and in the absence of adequate excuse:

(1) If this is the first time counsel has been delinquent, or if the last time he failed to appear promptly was more than two years ago, he shall be ordered to pay a fee in a reasonable amount to each opposing counsel who has appeared.

(2) If this is the second time, and it is within two years of the first, the lawyer will be required to pay a fee in a reasonable amount to each opposing counsel who has appeared, and will, in addition, be cited to show cause before a judge of this court why he should not be suspended from practice for a period of time or subjected to some other form of disciplinary action.

(3) The fee is not to be waived, nor is it to be returned or taken into account on settlement. It is not to be billed or charged in any way to a client.

b. For failure without adequate excuse to appear for a trial, or a hearing for which witnesses have been summoned, or for unreasonable delay in appearing at such times, the lawyer will be required to show cause why he should not be subject to disciplinary action by the court.

APPENDIX B


SHREVEPORT
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RESPONDENT'S

BRIEF

NO. 86-475

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

DAVID C. FRAZIER,

Petitioner,

versus

HONORABLE FREDERICK J. R. HEEBE, CHIEF JUDGE,
United States District Court
for the Eastern District of Louisiana, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS

Curtis R. Boisfontaine
(Counsel of Record)
Sally A. Shushan
Sessions, Fishman, Rosenson,
Boisfontaine, Nathan & Winn
3500 Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana 70170
Telephone: (504) 582-1500

Attorneys for Respondents

QUESTION PRESENTED

May the United States District Court for the Eastern District of Louisiana, pursuant to its inherent rule-making authority, require that applicants for general admission to its bar either reside or maintain an office in the State of Louisiana?*

*Pursuant to Supreme Court Rule 34.2, respondents submit this Question Presented. This Question is different from that of petitioner who states that:

> "May a federal district court require applicants for admission to its bar to live or maintain an office in the state where that court sits, when such a requirement would be unconstitutional if imposed by a state court?"

As shall be explained in respondents' brief, petitioner's Question Presented is incorrect and misleading insofar as it suggests the Local Rules of the Eastern District would be unconstitutional if imposed by a State court.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS

Respondents, all of the United States District Judges of the Eastern District of Louisiana in regular active service, respectfully submit this Brief in support of the Local Rules involved herein.

STATEMENT OF THE CASE

Petitioner, an adult citizen and resident of the City of Pascagoula, State of Mississippi, is an attorney and member of the bar of that State and is a member of the bar of the State of Louisiana. On April 27, 1982, he petitioned the United States District Court for the Eastern District of Louisiana (the "Eastern District"), seeking general admission to practice before that court. At the time of his application, petitioner admitted that he did not reside nor did he maintain an office for the practice of law in the State of Louisiana, contrary to the provisions of the Eastern District Local Rule 21.2 (*see* Appendix to the Petition for Writ of Certiorari, hereinafter "Petitioner's Appendix" E at 44a). Petitioner's application for general admission to the Eastern District Bar was rejected by the court because of his failure to comply with either of the alternative criteria of Rule 21.2.

Petitioner initiated this action on January 5, 1983, by filing a "Petition for Extraordinary Writ of Prohibition and/or in the Alternative for Injunctive Relief" with the United States Court of Appeals for the Fifth Circuit, challenging the constitutionality of Local Rule 21.2. Respondents filed an Answer to the Petition, and on February 14, 1983 the Fifth Circuit remanded the matter to the Eastern District "for appropriate proceedings, including the entry of an appealable judgment.

On March 30, 1983, petitioner filed a Complaint in the Eastern District alleging the invalidity of Local Rules 21.2 and 21.3.1, and respondents filed an Answer on April 14, 1983. As all active and senior Judges for the Eastern District recused themselves, the case was assigned to the Honorable Edwin F. Hunter, Jr., Senior District Judge of the Western District of Louisiana.

A one-day bench trial was conducted on April 2, 1984. The trial court rendered judgment on September 12, 1984, dismissing the action with prejudice (Petitioner's Appendix D at 43a), and rendered an extensive and scholarly opinion supporting the judgment (Petitioner's Appendix D at 23a-42a; *Matter of Frazier*, 594 F.Supp. 1173 (E.D. La. 1984)).[1]

Judge Hunter, in considering petitioner's challenge to the Local Rules under the equal protection component of the Due Process Clause of the Fifth Amendment, correctly found that the Local Rules did not discriminate against a "suspect class", nor did they infringe upon a "fundamental right" for equal protection purposes. (594 F.Supp. at 1180; Petitioner's Appendix D at 30a-32a). Judge Hunter held that the Local Rules serve "at least one important governmental objective, the efficient administration of justice" (594 F.Supp. at 1183; Petitioner's Appendix D at 35a), and concluded "that requiring nonresident attorneys to open a local office as a prerequisite to general admission is a means that is substantially related to the important governmental objective of promoting the efficient administration of justice." (594 F.Supp. at 1185; Petitioner's Appendix D at 39a).

As to petitioner's challenge of the Local Rules under the Privileges and Immunities Clause, Judge Hunter ruled that the equal protection analysis established "that the unrestricted general admission of nonresident attorneys to the

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1 **The trial court considered and rejected each of petitioner's constitutional challenges to the Local Rules: (1) Article I, Section 8, The Commerce Clause; (2) Article IV, Section 1, The Full Faith and Credit Clause; (3) Article IV, Section 2, the Privileges and Immunities Clause; (4) The First Amendment, Freedom of Speech and Association Clauses; (5) The Fifth Amendment, The Equal Protection and Due Process Clauses; (6) The Fourteenth Amendment, The Equal Protection and Due Process Clauses.**

Eastern District bar impairs the efficient administration of justice" . . . , and thus "there is a 'substantial reason' to treat nonresident attorneys differently than resident attorneys." (594 F.Supp. at 1185; Petitioner's Appendix D at 40a). The Local Rules were therefore found not to violate the Privileges and Immunities Clause, even if it were applicable in limiting the rule-making power of the federal judiciary.

On appeal, petitioner asserted claims under the Privileges and Immunities Clause and the Fifth Amendment, thereby dropping his claim that the Local Rules violated other constitutional provisions. The United States Court of Appeals for the Fifth Circuit affirmed the trial court's judgment (Petitioner's Appendix C at 22a) (Goldberg, Circuit Judge, dissenting). In its opinion (*Frazier v. Heebe*, 788 F.2d 1049 (5th Cir. 1986)), the appellate court found that the Privileges and Immunities Clause was inapplicable to federal court rules adopted pursuant to a congressional grant of authority. The court further held that petitioner "is not a powerless outsider in need of the protection of the privileges and immunities clause, and that clause provides him with neither a shield nor a lance." (Petitioner's Appendix A at 4a; 788 F.2d at 1052).

In reviewing petitioner's challenge under the aegis of the equal protection component of the Due Process Clause of the Fifth Amendment, the Fifth Circuit found that Frazier's assertion of being a member of a suspect class was "manifestly inapplicable", and that petitioner asserted no fundamental right which was implicated by the Local Rules of the Eastern District. (Petitioner's Appendix A at 4a-5a; 788 F.2d at 1053). The court correctly pointed out that petitioner is not prohibited from practicing before the Eastern District, but rather is able to apply for *pro hac vice* admission and seek waiver of the local counsel requirement. Thus, the Fifth

Circuit agreed that the Local Rules bear sufficient rational relationship to the Eastern District's goals, and that petitioner's ability to practice in the Eastern District was not inappropriately burdened by the Rules. (Petitioner's Appendix A at 8a; 788 F.2d at 1055).

Petitioner sought rehearing with suggestion for rehearing *en banc*, which was denied without opinion (Petitioner's Appendix B at 20a-21a), and thereafter petitioned this Honorable Court for a writ of certiorari which was granted on November 17, 1986.

SUMMARY OF ARGUMENT

Petitioner contends that Local Rules 21.2 and 21.3.1 promulgated by the United States District Court for the Eastern District of Louisiana discriminate against attorneys who are admitted to practice before the Louisiana Supreme Court but who do not reside in Louisiana. Contrary to his assertion, however, a non-resident attorney may be admitted to generally practice in the Eastern District. The Local Rules in question impose an alternative requirement that a lawyer *either* reside *or* maintain an office for the practice of law in the State of Louisiana. As such, a lawyer in good standing at the bar of the Supreme Court of Louisiana may reside anywhere he so desires *and* be a member of the bar of the Eastern District as long as he maintains an office for the practice of law in the State. In short, the Local Rules apply to all members of the Louisiana bar wherever resident and in no way discriminate against non-resident attorneys.

Additionally, while petitioner attacks the constitutionality of the Local Rule requiring continuing eligibility, that Rule, in fact, provides for even-handed treatment of all attorneys practicing before the Eastern District Court. Thus, a member of the bar of the Eastern District, admitted at the time he was a resident of the State of Louisiana, must continuously

maintain an office for the practice of law in the State, should he decide to reside elsewhere.

Petitioner has presented no facts whatsoever to refute respondents' evidence that the Local Rules do not discriminate in any way against non-resident attorneys. Moreover, petitioner has failed entirely to offer any evidence of prohibited discriminatory intent, enforcement or application of the Local Rules. No prior decision has ever suggested that the kind of alternative criteria provided by the Local Rules should be stricken for any reason.

ARGUMENT

A. THIS COURT'S RULING IN *PIPER* DOES NOT RESULT IN THE INVALIDATION OF THE LOCAL RULES UNDER REVIEW

Petitioner's primary argument is founded on his assertion that the Local Rules of the United States District Court for the Eastern District of Louisiana would be unconstitutional if enacted by a State court. This section will explain why the disjunctive criteria of State residency or maintenance of an office in the State would be perfectly constitutional if imposed by a State court.

Petitioner principally relies on the decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed. 2d 205 (1985), which invalidated, under the Privileges and Immunites Clause, a rule of the New Hampshire Supreme Court which required an applicant for admission to the New Hampshire bar to be a *bona fide* resident of the State of New Hampshire.

The rule of the New Hampshire Supreme Court did not include two critical elements contained in the Local Rules under scrutiny herein. The Local Rules of the Eastern District

require that every member of the Louisiana bar, whether resident in Louisiana or elsewhere, must either be a resident of, and continuously maintain a residence in Louisiana, or continuously maintain an office for the practice of law in Louisiana. In sharp contrast, the New Hampshire rule did not allow Piper the option of maintaining an office in New Hampshire, nor did it require that an applicant maintain continuing residency after having been admitted to the New Hampshire bar.

In his brief, petitioner concedes "that there are two arguable distinctions" between the rule in *Piper* and Local Rules 21.2 and 21.3.1, but argues that they are of no moment in reviewing the Local Rules and passing on their constitutionality.

However, these distinctions were considered significant throughout the judicial course of the *Piper* decision. Thus, the United States Court of Appeals for the First Circuit, in finding the New Hampshire rule violated the Privileges and Immunities Clause, indicated that its decision rested in large part upon the fact that the New Hampshire rule did not provide for continuing residency and/or for the option of maintaining a law office in the State:

> It should be observed as well that New Hampshire's rule does not require continuing residency, but only residency at the time of admission to the bar, combined with intent to remain. This permits bar members to leave the State after admission without forfeiting their membership and belies the State's asserted justification for the rule.

* * *

> To facilitate availability for Court, the State might require that nonresidents maintain an office or affiliate themselves with lawyers within the State.
>
> 723 F.2d 117 (1st Cir. 1983) (en banc).

This Court, in affirming the First Circuit's ruling, also found these same deficiencies to be of importance in concluding that the New Hampshire rule was unconstitutional.

> New Hampshire's 'simple residency' requirement is underinclusive as well, because it permits lawyers who move away from the State to retain their membership in the bar. There is no reason to believe that a former resident would maintain a more active practice in the New Hampshire courts than would a nonresident lawyer who had never lived in the State.
>
> 105 S.Ct. 1279, n. 19.

* * *

> The trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who would be available for unscheduled meetings and hearings.
>
> 105 S.Ct. 1280.

These deficiencies are conspicuously absent from the Local Rules here under review.

Further pointing out the distinguishing features between the New Hampshire rule and the Local Rules involved herein, Justice White, in his concurring opinion in *Piper*, pointed out that Piper intended to maintain a law office in the State of New Hampshire, yet the New Hampshire rule prohibited her general admission to practice under those circumstances. 105 S.Ct. at 1281.

The Eastern District's alternative requirements of maintenance of a residence *or* law office in the State, *and* its requirement of continuing eligibility to qualify for general practice before the Eastern District Court, clearly distinguish the Eastern District's Rule from the New Hampshire rule which was found violative of the Privileges and Immunities Clause. Petitioner's basic premise that the Eastern District Local Rules impose the same restrictions on bar applicants as were presented in *Piper* is simply not the case.

Moreover, petitioner's contention that the Local Rules would be unconstitutional if imposed by a State court is erroneous. The distinguishing features of the Local Rules involved herein provide even-handed treatment to all Louisiana-licensed attorneys, and the Rules do not result in any discrimination against non-residents which is actionable under the Privileges and Immunities Clause or the Due Process Clause of the Fifth Amendment.[2]

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2 See also, *Stalland v. South Dakota Board of Bar Examiners*, 530 F.Supp. 155, 160 (D. S.D. 1982), indicating that a State could require non-resident attorneys to maintain an office in the State or require association of local counsel; *In Re Jodd*, 391 Mass. 227, 461 N.E. 2d 760 (1984), indicating a continuing residency requirement or an association of local counsel requirement would be constitutional.

B. THE PRIVILEGES AND IMMUNITIES CLAUSE IS INAPPLICABLE

In urging the Court to apply a "privileges and immunities" analysis to this case, petitioner glosses over the source of the Eastern District Court's authority to enact Local Rules. Like all federal district courts, the Eastern District exists under the auspices of Article III of the United States Constitution. Pursuant to Congressional and Judicial Conference mandates, 28 U.S.C. §§1654 and 2071, Fed.R.Civ.P. 83, (Respondents' Appendix), federal district courts are empowered to enact their own individual rules; implicit in those authorizations is the recognition that there need not be uniform local judicial rules. Thus, while petitioner has consistently argued that the Local Rules should be stricken in order to promote national and interstate harmony, citing Smith, *Time for a National Practice of Law Act*, 64 A.B.A.J. 557, 558 (1978), petitioner has found no authority whatsoever indicating that Congress has ever expressed any intent that a district court's local rules governing bar admission be an integral part of any required national harmony.[3] By the same token, it should be noted that 24 federal districts (in 10 federal circuits) have enacted rules similar to the Local Rules of the Eastern District under consideration herein.[4]

Indeed, recent circuit court cases construing rules respecting the admission of lawyers to practice before federal district courts have consistently recognized the courts' inherent

3 *See*, *Retaining Out-Of-State Counsel: The Evolution of a Federal Right*, 67 Colum.L.Rev. 731, 737-38 (1967), pointing out that although numerous proposals have been made for uniform federal regulation of a federal bar, Congress has instead chosen to delegate to the district courts the authority to enact local rules regulating admission to the bar.

4 *Frazier v. Heebe*, 788 F.2d at 1054 n.7; Petitioner's Appendix A at 7a n.7.

power to enact such rules. *See*, *e.g.*, *Brown v. McGarr*, 774 F.2d 777 (7th Cir. 1985); *Matter of Roberts*, 682 F.2d 105 (3rd Cir. 1982); *Aronson v. Ambrose*, 479 F.2d 75 (3rd Cir. 1973), *cert. denied*, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (1973); and most recently, *Frazier v. Heebe*, 788 F.2d 1049 (5th Cir. 1986). Clearly, the Privileges and Immunities Clause, which by its very terms is a limitation on State action, does not limit the rule-making power of the federal judiciary,[5] whose authority to regulate admission to practice is unrelated to state criteria:

> Rulemaking by the courts within their power under 28 U.S.C. §1654 may prove inconvenient even somewhat burdensome to counsel migrating from district to district. That alone does not make it unconstitutional.
>
> *Galahad v. Weinshienk*, 555 F.Supp. 1201, 1203 (D.Col. 1983).

See also, *Theard v. United States*, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342 (1957).

The Privileges and Immunities Clause creates by its very terms a limitation on the powers of States. Cases interpreting the Clause stand for the proposition that the citizens of State A who venture to State B must be accorded the same privileges as enjoyed by the citizens of State B. *See*, *e.g.*, *Toomer v. Witsell*, 334 U.S. 386, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948); *Austin v. New Hampshire*, 420 U.S. 656, 95 S.Ct. 1191,

5 *See*, *e.g.*, *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 145 (1st Cir. 1976).

43 L.Ed.2d 530 (1975). However, the mandate of the Privileges and Immunities Clause has limitations:

> It was long ago decided that one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of *substantial equality* with the citizens of that state. (Emphasis added).
>
> *Austin*, *supra*, 95 S.Ct. at 1196, n.9.

Therefore, the Privileges and Immunities Clause is not a blanket prohibition against any disparity whatsoever, but guarantees only "substantial equality". It is respectfully submitted that Local Rules 21.2 and 21.3.1 accord plaintiff substantially the same and equal treatment as is accorded Louisiana resident attorneys. Under the Local Rules, all Louisiana-licensed lawyers, including petitioner, are treated equally in the requirement that all applicants for general admission to the Eastern District must have a Louisiana residence or a Louisiana law office, and must maintain their continuing eligibility. Thus, petitioner has entirely failed to meet his burden of proof; that is, he has failed to demonstrate that the Local Rules favor residents vis-a-vis non-residents. *See*, *Hawkins v. Moss*, 503 F.2d 1171, 1179-80 (4th Cir. 1974), *cert. denied*, 420 U.S. 928, 95 S.Ct. 1127, 43 L.Ed.2d 400 (1975); *Service Machine and Shipbuilding v. Edwards*, 617 F.2d 70 (5th Cir. 1980); *Shapiro v. Cook*, 552 F.Supp. 581 (N.D. N.Y. 1982) *aff'd. memo.* 702 F.2d 46 (2d Cir. 1983).

On this basis the Court should affirm the appellate court's decision, thereby finding that the Local Rules do not impose a substantial discrimination which is actionable under a privileges and immunities analysis, even if this Court should

find that such analysis is applicable to a federal district court's rule-making authority:

> . . . [T]he unrestricted general admission of nonresident attorneys to the Eastern District bar impairs the efficient administration of justice. Thus there is a 'substantial reason' to treat nonresident attorneys differently than resident attorneys. The discrimination imposed, the requirement that nonresident attorneys open a Louisiana office, bears a close relation to this substantial reason because it alleviates the problems presented by general admission of nonresident attorneys without greatly restricting the ability of those attorneys to practice before the Court. The Court therefore concludes that Rule 21.2 would not violate the Privileges and Immunities Clause if it were applicable.
>
> *Matter of Frazier*, 594 F.Supp. at 1185.

C. THE LOCAL RULES ARE NOT VIOLATIVE OF THE FIFTH AMENDMENT

Even though petitioner concedes that the Privileges and Immunities Clause does not limit the federal action involved herein, he persists in analogizing the disparate facts and legal analysis involved in *Piper* to the case at bar. Petitioner's only claim before this Court is that the Local Rules violate the Fifth Amendment's Due Process Clause. Yet *Piper* and the decisions cited therein are not applicable to this challenge since neither the district court, the United States Court of Appeals for the First Circuit, nor this Honorable Court considered Piper's claims that the New Hampshire rule deprived her of due process of law. *See* 105 S.Ct. at 1272 n.3.

Of particular importance in evaluating petitioner's claim that the Local Rules violate the Due Process Clause of the Fifth Amendment is an understanding of what attorneys seeking to practice law before the Eastern District may and may not do under the Local Rules. Petitioner is not being denied permission to practice law in the Eastern District Court. Under Local Rule 21.5, petitioner may qualify to practice in the Eastern District *pro hac vice*, and, under Local Rule 21.6, may have the requirement of associating local co-counsel waived.[6] Yet petitioner has never applied for *pro hac vice* admission in the Eastern District and therefore has made no showing that he has been prohibited from practicing before that court.

Thus, when the Local Rules are read *in pari materia*, it is clear that petitioner may practice before the United States District Court for the Eastern District of Louisiana even though he does not choose to reside or maintain an office in the State:

> We are persuaded that the regulatory scheme of the Eastern District bears sufficient rational relationship to that court's goal of an efficient administration of justice. We are further persuaded that, in reality, Frazier's ability to practice in the Eastern District is not inappropriately burdened by the rules.
>
> *Frazier v. Heebe*, 788 F.2d at 1055.

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6 In fact, petitioner was represented in the district court by Gary L. Roberts, an attorney who resides and practices law in Pascagoula, Mississippi. Mr. Roberts was admitted to practice before the Eastern District under the Court's *pro hac vice* admission rule, Local Rule 21.5 (Petitioner's Appendix E at 46a), and, pursuant to the provisions of Local Rule 21.6 (Petitioner's Appendix E at 46a-47a), the requirement of associating local co-counsel was waived.

Where then is the burden or obstacle which petitioner contends is violative of the Fifth Amendment?

Petitioner argues that the Court should review his complaint of unconstitutionality under a heightened level of scrutiny because the Local Rules discriminate against a "suspect class" (presumably a class of non-residents) and impinge on the exercise of a "fundamental right" or "on personal rights protected by the Constitution". (Petitioner's Brief at 19-20). Petitioner cites decisions which have imposed strict or heightened scrutiny in cases involving discrimination against suspect classes or which restrict fundamental rights, but admits that the "general rule" under an equal protection analysis is that the legislation is presumed to be valid and will be sustained if the classification drawn is rationally related to a legitimate governmental interest. *See City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249 (1985) (holding that mental retardation is not a suspect or quasi-suspect classification); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (holding that the right to education is not a fundamental right, nor did a classification based to some extent on wealth and locale of residence create a suspect class).

Even so, petitioner maintains that his status as a Louisiana non-resident under the Local Rules involves discrimination against a "suspect class", and the Local Rules impinge on his "fundamental right" to practice law. Of course, petitioner cites no authority for his assertion that the Local Rules discriminate against a suspect class or restrict any fundamental right granted under the Fifth Amendment. *Aronson v. Ambrose*, 479 F.2d 75 (3rd Cir. 1973), *cert. denied*, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (1973), involved the applicability of the equal protection analysis to bar admission qualifications. In *Aronson*, the United States Court of Appeals for the Third Circuit upheld the constitutional validity of a rule of the District Court of the Virgin Islands

requiring an applicant for general admission to the district court bar to allege and to prove that if admitted he intended to reside in and practice law in the Virgin Islands. The Court of Appeals specifically rejected plaintiffs' contention that the Local Rule denied applicants equal protection of the law, and stated:

> The interest of a state or territory in promoting the speedy and efficient administration of justice in its courts by assuring the competence and discipline of its bar is great and the actions of its legislature and courts toward these ends ought not to be interfered with except with the greatest caution and only if the measure in question is clearly Constitutionally impermissible.
>
> 479 F.2d at 77.

Matter of Roberts, 682 F.2d 105 (3rd Cir. 1982), addressed a claim of violation of the Fifth Amendment under equal protection principles in the context of a denial of an application for general admission to the bar of the United States Court for the District of New Jersey. The Third Circuit Court of Appeals properly disposed of the Fifth Amendment issue, refusing to recognize the practice of law as an interest protected by the Fifth Amendment:

> Roberts claims that he has a constitutional right to be admitted to the bar of the district court because the record below is barren of evidence that would tend to show that he is morally or professionally unfit to practice law.
>
> • • •

> To invoke the protections of the Fifth Amendment, a litigant must first establish that the individual interest asserted is encompassed within its terms. The Amendment protects property interests created and defined by independent sources such as statutes, legal rules, or mutually explicit understandings, but it does not create property interests of its own force. Roberts does not cite any rule or statute, nor does he refer to any mutually explicit understanding, that would support his claim of denial of a property right to practice law in the district court. Nor can we conclude that application of Rule IV deprives appellant of a liberty interest protected by the Fifth Amendment.
>
> 682 F.2d at 107 (Citations omitted).

See also, *Frazier v. Heebe*, *supra*, 788 F.2d at 1052-53 (Petitioner's Appendix A at 4a-5a); *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 862 (1986) (upholding, under the Due Process Clause, a State rule admitting an attorney without examination only if the applicant intended to practice fulltime in the State); *Martin v. Walton*, 368 U.S. 25, 82 S.Ct. 1, 7 L.Ed.2d 5 (1961).

Since petitioner cannot rely on the traditional analyses applied by the courts in reviewing cases involving the Due Process Clause of the Fifth Amendment, he instead asks this Court to expand the reach of the Clause to subsume the Privileges and Immunities Clause, or, alternatively, to broaden the Due Process Clause by finding that the Local Rules discriminate against a suspect class or impinge upon the exercise of a fundamental right. However, such a request is clearly contrary to this Court's recent pronouncement in

Bowers v. Hardwick, 106 S.Ct. 2841, 2846 (1986), wherein the Court rejected theories requiring expansion of the Due Process Clause:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. . . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.

In considering whether petitioner has a recognized right to practice law under the Fifth Amendment, the trial court correctly stated that there was no jurisprudential or constitutional authority for deeming the practice of law a fundamental right requiring strict scrutiny analysis:

> This Court can find no Supreme Court or federal appellate decision that establishes the right to practice law as protected directly under the Constitution without resort to some other constitutional guarantee, such as equal protection of the laws. Indeed, substantial authority supports the proposition that a right to practice law cannot be derived independently from the Constitution. The Court therefore concludes that the right to practice law is not a fundamental interest for purposes of equal protection review and it will not apply strict scrutiny on that basis.
>
> *Matter of Frazier*, 594 F.Supp. at 1180-1181.

It is therefore apparent that petitioner has no "fundamental right" to practice law in the Eastern District granted by the Fifth Amendment, nor is he a member of a "suspect class"

under that same provision, and therefore his challenge to the Local Rules must be reviewed based on a presumption that the Rules are valid. *City of Cleburne*, *supra*, 105 S.Ct. 3249.

Therefore, petitioner's claim that the Local Rules are unconstitutional must be viewed under the traditional equal protection analysis. That is, petitioner, in order to be successful in challenging the Local Rules, must show that he has suffered a "significant deprivation of a benefit or imposition of a substantial burden", *Califano v. Boles*, 443 U.S. 282, 295, 99 S.Ct. 2767, 2775, 61 L.Ed.2d 541 (1979), and that the Rules are not rationally related to a legitimate governmental interest. *San Antonio Independent School District*, *supra*, 93 S.Ct. 1278. Petitioner cannot make this showing.

In fact, the evidence adduced at trial irrefutably rebuts petitioner's contentions. Petitioner testified and asserts here that since he lives and practices law in Pascagoula, Mississippi, which is approximately 110 miles away from the Eastern District courthouse, his location from the courthouse is geographically closer than members of the Eastern District bar who reside and practice in Louisiana cities such as Shreveport and Lake Charles (Trial Transcript, pp. 30-32, hereinafter "Tr."). However, on cross-examination, petitioner did not claim to have any greater rights than any other member of the Louisiana bar who resides in New York, Puerto Rico, Alaska or Hawaii, thereby agreeing that his particular situation did not bear on the validity of the Local Rules in question. (Tr. 49-50). Petitioner also agreed that if a Louisiana lawyer is admitted to the Louisiana bar, and has both a residence and office in Louisiana, and subsequently moves to Houston, he would have to maintain an office in Louisiana in order to remain a member of the Eastern District bar (Tr. 57), and therefore all Louisiana-licensed lawyers must comply with the Local Rules. (Tr. 60).

Loretta Whyte, Clerk of Court, United States District Court for the Eastern District of Louisiana, qualified at trial as an expert witness in the Clerk's administration of the Eastern District. Ms. Whyte testified that generally attorneys located out-of-state more frequently submit pleadings for filing which do not comply with Local Rules than do in-state attorneys (Tr. 153), and that out-of-state attorneys cause the Clerk's office more problems than do resident attorneys. (Tr. 156). The problems created by out-of-state attorneys increase the workload of the Clerk's office, and it is Ms. Whyte's opinion that without the Local Rules in question the problems would be magnified (Tr. 157), thereby increasing administrative inconvenience, and increasing costs and burden to the taxpaying public. (Tr. 157-170).

Magistrate Ingard O. Johannesen, a Magistrate of the Eastern District for approximately nine and a half years, deals principally with criminal matters. The Magistrate was qualified as an expert in judicial administration (Tr. 174), and testified that out-of-state counsel make it difficult for him to abide by the Speedy Trial Act. (Tr. 180-181). It has been Magistrate Johannesen's experience that, on emergency hearings on short notice, out-of-state counsel impede the scheduling of such matters, and the Magistrate does not find that telephone conferences among multiple parties are satisfactory in criminal cases. (Tr. 185). While the Magistrate did testify that he does occasionally encounter similar problems with local lawyers, he finds that the vast majority of such problems are caused by out-of-state counsel. (Tr. 192).

Magistrate Michaelle Pitard Wynne handles an almost exclusive civil docket in the Eastern District. Magistrate Wynne testified that non-resident attorneys often impede the progress of a proceeding (Tr. 206), and that she finds that telephone conferences cannot be substituted for face-to-face contact in pretrial conferences, especially in large, complex

cases with more than two attorneys. (Tr. 207). Often out-of-state counsel complain concerning scheduling of such conferences because of the time and expense involved in coming to New Orleans. (Tr. 207). The Magistrate firmly stated that the Local Rules under attack are reasonably related to preventing the non-resident lawyer problems she has encountered during her tenure as a Magistrate. (Tr. 216).

On cross-examination, Magistrate Wynne was asked whether the provisions of Rule 37, Fed. R.Civ.P., and the disciplinary provisions under the Local Rules were adequate remedies to the problems encountered with out-of-state attorneys, and she stated that they were not, as her main concern is to do justice and grant relief to the parties rather than impose sanctions on a non-resident lawyer for non-compliance with the court's rules or orders. (Tr. 221-22).

Judge Veronica D. Wicker was also qualified as an expert in judicial administration (Tr. 230), based on her experience as a United States Magistrate for approximately two years, and her experience as a United States District Court Judge for over four years. Judge Wicker testified that it was her experience, both as a Magistrate and a Judge, that out-of-state attorneys create a burden and inconvenience to the court, other litigants and their counsel. (Tr. 234). She believes that the maintenance and enforcement of the Local Rules are very important for, with the size of the Eastern District's docket, each Judge cannot be a "watchdog" over every attorney that comes before the court. The Local Rules provide a control over the attorneys practicing before the Eastern District, and lack of those controls "can cause havoc with your docket". (Tr. 246).

Judge Morey L. Sear was qualified and admitted as an expert witness in judicial administration (Tr. 258-59), based on his experience as a United States Magistrate for

approximately six years, and as a United States District Judge for approximately eight years. (Tr. 259). Judge Sear testified that non-resident lawyers have always been a problem, and cited as an example the fact that many out-of-state attorneys are unwilling to comply with Local Rule requirements mandating personal appearances in motion practice and face-to-face meetings in pretrial proceedings. This results in unnecessary expense to the client, prolongation of the litigation, and inability to accomplish "the prompt and speedy disposition of a cause of action". (Tr. 260-61).

Judge Sear serves on two committees of the Judicial Conference, has consistently taught case management to Magistrates and newly appointed Judges, and developed, along with Judge Rubin, the case management system employed in the Eastern District. (Tr. 262-63). The system involves the use of a Magistrate early in proceedings to conduct preliminary conferences among all lawyers involved in cases. Such a system is now codified in Rule 16, Fed. R.Civ.P., and he requires that the designated trial attorney whether resident or non-resident, personally appear before the Magistrate. (Tr. 264). Judge Sear believes that meaningful case discussion is necessary early in the litigation, that this requires head-to-head meeting and cannot be accomplished by long distance telephone conferences. (Tr. 264-68).

Judge Sear is steadfast in his opinion that Local Rules 21.2 and 21.3.1 are necessary to aid the court in effectively managing its docket and otherwise providing sound administration and case management. (Tr. 270). It is his opinion that out-of-state lawyers prolong the discovery and pretrial process (Tr. 271), request hearings and waivers of Local Rule requirements in order to accommodate them while they are in the district (Tr. 272), and make it difficult for the Judge to sound his docket and meet with counsel in settlement efforts prior to trial, since non-resident attorneys do not want to come to such pretrial meetings. (Tr. 273-74).

In answer to a question from Judge Hunter, Judge Sear stated that an out-of-state lawyer has the same right as a New Orleans lawyer to institute or defend a lawsuit in the Eastern District, except for the additional requirement that an attorney admitted generally to practice in the Eastern District be associated (Tr. 277), that he routinely grants motions for *pro hac vice* admissions, and the Local Rules grant him the discretion to waive the requirement of local counsel for good cause shown. (Tr. 285).

Thus, petitioner has not been denied access to practice before the United States District Court for the Eastern District of Louisiana, but rather, has to comply with reasonable requirements that are rationally related to the Eastern District's goal of efficient administration of justice:

> In evaluating his challenge, what the rule does and what it does not do must be kept in sharp focus. The rule does *not* bar nonresident attorneys who are licensed in Louisiana from general admission to the Eastern District bar. The rule *does* require such attorneys to establish an office in Louisiana as a prerequisite to their general admission. If the nonresident attorney does not open an office and thereby qualify for general admission to the district court's bar, then he can appear in a particular action only by satisfying the requirements for a *pro hac vice* appearance. *See* Eastern District of Louisiana Local Rule 21.5.
>
> *Matter of Frazier*, 594 F.Supp. at 1180.

• • •

> Here, Frazier is not 'irretrievably foreclosed' from appearing before the Eastern District; he need only comply with certain additional procedures which serve quite legitimate interests in ensuring that counsel is locally available to the court and in assuring that the attorney has the requisite ethical integrity.
>
> *Matter of Frazier*, 594 F.Supp. at 1181.

In light of the foregoing, it is respectfully submitted that petitioner's claim of invalidity of the Local Rules pursuant to the Fifth Amendment is unwarranted and unsupported. Petitioner has not been deprived of any protection given others and denied to him. The requirements which have been applied to petitioner apply to all members of the Louisiana bar seeking admission to practice before the Eastern District.

Petitioner also complains that the Local Rules under scrutiny are, as found by the Fifth Circuit, 788 F.2d at 1054, both overinclusive and underinclusive. However, the appellate court concluded that the record reflected no invidious, discriminatory, or other inappropriate basis for the rules, and concluded that the Judges of the Eastern District acted in a reasonable manner in enacting the Local Rules. That is all that is required:

> Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required'.
>
> *Vance v. Bradley*, 440 U.S. 93, 108, 99 S.Ct. 939, 948, 59 L.Ed.2d 171 (1979).

See also, *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970), wherein this Court stated:

> If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety' or because in practice it results in some inequality. (Citations omitted).
>
> * * *
>
> It is a standard that has consistently been applied to State legislation restricting employment opportunities. (Citations omitted).

See also, *City of New Orleans v. Dukes*, 96 S.Ct. 2513, 427 U.S. 297, 49 L.Ed.2d 511 (1976).

Petitioner apparently does not question this Court's statement in *Piper* that a "trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and hearings". 105 S.Ct. at 1280. (Petitioner's Brief p. 26, 33). Predictably, petitioner asserts that he is not "a great distance" away from the Eastern District and therefore a court may not require him to associate local counsel. The problem with this reasoning is where does a court draw the line? 100 miles,[7] 150 miles, 500 miles from the courthouse? Or does a court, as the Eastern District has

---

7 **For instance, if the District Court determined that all attorneys who resided and/or had a law office more than 100 miles away from the courthouse must associate local counsel, would such a rule be permissible? In such a case, petitioner, who resides approximately 110 miles away from the courthouse, would be required to associate a local attorney, and would certainly complain.**

done, draw the line at the jurisdictional boundaries of the court?[8] Such a limitation is certainly more rational than a rule determining what "a great distance" might be. Yet petitioner apparently continues to assert that his particular location from the Eastern District entitles him to greater rights than any other Louisiana-licensed attorney who does not reside nor maintain an office in the State of Louisiana. (*See* Petitioner's Brief pp. 23-24).

Petitioner next contends that the Local Rules should be stricken because "there are far less restrictive means" of achieving the Eastern District's goals (Petitioner's Brief p. 28), yet again petitioner cites no authority for his assertion that the Local Rules are unconstitutional on this basis. The Court is respectfully directed to Chief Justice Rehnquist's dissent in *Piper*, wherein he stated:

> In addition, I find the Court's 'less restrictive means' analysis both ill-advised and potentially unmanageable. Initially I would note, as I and other Members of this Court have before, . . . that such an analysis, when carried too far, will ultimately lead to striking down almost any statute on the ground that the Court could think of another 'less restrictive' way to write it. This approach to judicial review, far more than the usual application of a standard of review, tends to place courts in the position of second-guessing legislators on legislative

8 Such a geographical limitation is consistent with the reach of subpoenas for appearance before the district courts of Louisiana. *See* Rule 45, Fed. R.Civ.P., allowing service of subpoenas "at a place within the state where a state statute or rule of court permits service of a subpoena issued by a state court . . ."; and LSA-C.Civ.P. Art. 1351, empowering a state court to subpoena a witness "to attend a trial or hearing wherever held in this state."

> matters. Surely this is not a consequence to be desired. (Citations omitted).
>
> * * *
>
> And in any event courts should not play the game that the Court has played here – independently scrutinizing each asserted state interest to see if it could devise a better way than the State to accomplish that goal.
>
> 105 S.Ct. at 1284.

Petitioner also contends that the Rules impermissibly restrict the client's right to retain counsel (Petitioner's Brief pp. 33-34), and that *pro hac vice* admission does not solve the problem because of the requirement of association of local counsel. (This argument is also the main argument advanced in the *Amicus Curiae* brief submitted on behalf of the American Corporate Counsel Association).[9] But petitioner and *Amicus* do not confront the fact that similar rules have been held not to unduly infringe the rights of individual litigants. *See Raiford v. Pounds*, 640 F.2d 944 (9th Cir. 1981); *Ma v. Community Bank*, 686 F.2d 459 (7th Cir. 1982), *cert. denied*, 459 U.S. 962, 103 S.Ct. 287, 74 L.Ed.2d 273 (1982) (holding that a district court rule authorizing judges to require that non-resident attorneys associate local counsel was valid and did not infringe on litigants' rights). Nor do petitioner or *Amicus* explain their complaints in light of the evidence that the Eastern District "liberally" grants *pro hac vice* admissions or that Local

9 Both petitioner and *Amicus* complain that some district courts abuse *pro hac vice* admissions or limit the number of times an attorney may appear pro hac vice, *see, e.g.*, Petitioner's Brief pp. 26 n. 6, *Amicus Brief* pp. 7-9, but they cannot criticize the Eastern District or the Local Rules on this basis.

Rule 21.6 allows for waiver of the local counsel requirement upon showing of hardship to the client.

It is therefore clear that the Local Rules in question do not impose burdens on petitioner or his clients which are violative of the Due Process Clause or any other Constitutional provision. The Eastern District has enacted a regulatory scheme governing the practice of law in that court which is substantially and reasonably related to its legitimate governmental goal of effective and efficient administration of justice.

D. THIS HONORABLE COURT SHOULD DECLINE TO EXERCISE ITS SUPERVISORY POWERS

Petitioner finally requests that this Honorable Court exercise its supervisory power over the federal district courts by setting aside the Local Rules and, presumably, by enacting uniform local rules for admission to practice before all federal district courts. In view of the fact that the Local Rules were found to be valid, and in view of the fact that the Fifth Circuit Judicial Counsel is currently reviewing the Local Rules within the Fifth Circuit, the United States Court of Appeals for the Fifth Circuit declined to exercise its supervisory authority, as should this Honorable Court. Respondents do not dispute this Court's authority to exercise its supervisory power, but rather submit that since the Local Rules are consistent with the Constitution and the Federal Rules of Civil Procedure, the Eastern District and other district courts should be accorded the independence granted by Congress pursuant to 28 U.S.C. §§1654, 2071, and Rule 83, Fed.R.Civ.P.

CONCLUSION

The United States District Court for the Eastern District of Louisiana, pursuant to its inherent rulemaking authority, has enacted Local Rules 21.2 and 21.3.1 in order to further the legitimate governmental purpose of fostering efficient and effective administration of justice. Like 24 other federal district courts, the Eastern District Court perceived that lawyers who neither reside nor maintain an office in the State of Louisiana impede the efficient and effective administration of justice more frequently than do attorneys who either reside or maintain an office in the State, and enacted Local Rules which are reasonably directed to furthering the Court's goal. Petitioner has made no showing whatsoever of any invidious, discriminatory or otherwise inappropriate basis for the Local Rules, and has further presented no basis in fact to show that the Local Rules discriminate in any way against non-resident attorneys, or that they are applied or enforced in a discriminatory fashion.

For the above and foregoing reasons, therefore, it is respectfully submitted that this Honorable Court should affirm the judgment of the United States Court of Appeals for the Fifth Circuit, as the Local Rules in question are valid, legal and constitutional enactments.

Respectfully submitted,

Sessions, Fishman, Rosenson,
Boisfontaine, Nathan & Winn
Curtis R. Boisfontaine
(Counsel of Record)
Sally A. Shushan
3500 Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana 70170
Telephone: (504) 582-1500

ATTORNEYS FOR RESPONDENTS

APPENDIX

PERTINENT STATUTES AND RULES

In all courts of the United States parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

28 U.S.C. §1654.

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedures prescribed by the Supreme Court.

28 U.S.C. §2071.

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules . . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Rule 83, Federal Rules of Civil Procedure.

REPLY BRIEF

No. 86-475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID C. FRAZIER,

Petitioner,

v.

HONORABLE FREDERICK J.R. HEEBE, Chief Judge, United States District Court for the Eastern District of Louisiana, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Cornish F. Hitchcock
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

Of Counsel:
Gary L. Roberts
Roberts and Clark
P.O. Box 237
Pascagoula, Miss. 39567
(601) 762-7104

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondents try to distinguish *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), by arguing that Rule 21 is not a pure residence requirement, since out-of-state lawyers can be admitted to the Eastern District bar by opening an office within Louisiana, and further, that Rule 21 imposes a continuing residence/office requirement, whereas the rule in *Piper* required residence only at the time of admission. Respondents' Brief at 6-9. The brief also points to language in *Piper* about a court's ability to require lawyers located "a great distance" from the courthouse to have local counsel, *id.* at 287, from which they argue (at 25-26) that out-of-state lawyers are located at

such "a great distance" from the Eastern District that they may be excluded from that court's bar. While those arguments were addressed in our opening brief (at 10-11 and 26-28, respectively), some additional comments are warranted.

Before doing so, however, we note a gap in respondents' brief, which argues (at 19) that Rule 21 should be analyzed using the most deferential level of scrutiny, yet fails to address such Equal Protection cases as *Hooper v. Bernalillo County Assessor,* 472 U.S. 612 (1985), *Williams v. Vermont,* 472 U.S. 14 (1985), and *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869 (1985), which were discussed at pages 29-30 of petitioner's opening brief. In those cases, the Court used the "rational basis" standard, which respondents say should be employed here, to invalidate laws that discriminated between different classes of state residents, as well as between residents and non-residents. Despite their obvious relevance to this case, respondents' brief does not cite these decisions or offer any basis for distinguishing them.

A. The In-State Office Option Does Not Save Rule 21.

Rule 21 does allow non-residents to be admitted to the Eastern District bar if they open a Lousiana office. Contrary to respondents' assertion, however, that fact provides no basis for distinguishing this case from *Piper* or for arguing that the Privileges and Immunities Clause has no application here.

Louisiana residents seeking admission to the Eastern District bar are not required to have an office in Louisiana (though as a practical matter, they are likely to have one there anyway). For Louisiana residents, then, the in-state

office language in Rule 21 is surplusage. By contrast, the rule requires residents of other states, who are likely to have an office in their home state, to open a second office if they wish to be admitted to the Eastern District bar. An in-state office rule may thus appear to be neutral, but in fact, it imposes a burden on nonresidents which is not shared by state residents. Such a requirement is simply a thinly disguised surrogate for a residency requirement and must therefore be analyzed under the standard used in *Piper* and similar cases. *See Gordon v. Committee on Character and Fitness,* 48 N.Y.2d 266, 269 & n.1, 397 N.E.2d 1309, 1310 & n.1, 422 N.Y.S.2d 641, 642 & n.1 (1979).

Respondents also defend Rule 21 on the grounds that out-of-state lawyers are less familiar with local practices and less likely to be available for courtroom appearances than Louisiana lawyers. Respondents' Brief at 20-23. However, they have demonstrated no connection between the maintenance of one's home or office in Louisiana and one's competence as a federal litigator or one's ability to appear in district court in New Orleans on short notice. As the dissent below noted, respondents' case consisted largely of "vague, anecdotal reminiscences" about experiences with *pro hac vice* practitioners (Pet. App. 19a). Such evidence provides no basis for concluding that out-of-state lawyers who seek general admission to the bar are more likely to cause these problems than Lousiana lawyers.

Respondents' argument is also hobbled by the anomalies which Rule 21 creates, but which their brief simply ignores. The brief offers no reason why petitioner should be allowed to try cases on his own in Louisiana state court, but not across the street in federal district court. Nor does it say why he is qualified to appear *pro hac vice* in the Eastern District "as a matter of course" (Pet. App. 33a),

but he is not qualified to be licensed as a member in good standing of that court's bar.[1] Nor does it explain why his competence or availability would be assured if he became "of counsel" to a law firm in Shreveport, which is 300 miles from New Orleans, but within the state of Louisiana, but those same qualities cannot be assured if he practices solely out of his office in Pascagoula, which is only 110 miles from New Orleans, but within the state of Mississippi.

Even if Rule 21 were redrafted to require bar members to have an office in the Eastern District, it would still suffer from many of the deficiencies that now afflict it. It should be recalled that the in-state office requirement is satisfied by having a Louisiana address and telephone number, as well as someone such as a secretary to answer the telephone and communicate with the lawyer if the court tries to reach him or her. *See* Trial Transcript at 255. Requiring petitioner to open an office meeting those standards in the Eastern District or to affiliate with an in-district lawyer and then use the Louisiana address rather than his Mississippi address on all filings will not assure that petitioner will read the local rules or advance sheets any more conscientiously. Nor would such a rule assure that an in-district lawyer with whom he affiliates is better able to attend hearings in New Orleans than petitioner because, as the court of appeals noted, petitioner is closer to New Orleans than some lawyers who live in the District (Pet. App. 7a n.6).

Admittedly, an in-district office rule may appear to be more closely related to achieving a district court's goals

[1] From petitioner's perspective, he is entitled to greater rights if he can be admitted generally than if he must seek leave to appear *pro hac vice* in particular cases. *Compare In re Snyder*, 472 U.S. 634, 644-45 (1985), with *Leis v. Flynt*, 439 U.S. 438, 441-43 (1979).

than an in-state office rule, but even with an in-district rule, anomalies will occur, as the court of appeals' observation makes clear. This is true, not just for Mississippi lawyers seeking to practice in the Eastern District of Louisiana, but in other districts as well. For example, in the District of Kansas, an in-district office rule would allow lawyers from western Kansas to practice in Kansas City, Kansas, while excluding lawyers who practice in Kansas City, Missouri. Similarly, in the Eastern District of Virginia, an in-district office rule would allow lawyers from Norfolk to practice in Alexandria, while excluding lawyers from the District of Columbia or Baltimore, whose offices are more than 100 miles closer to Alexandria.

The point, simply stated, is that limiting bar memberships based on state or district boundaries is an ineffective and unsuitable means of assuring legal competence or the availability of lawyers for courtroom proceedings. Moreover, the public may need legal services which are not readily available within a given state or district. Particularly in metropolitan areas which are at or near a state line or federal district court boundary, there are many capable lawyers who can handle litigation effectively even though they live or work in the "wrong" district or the "wrong" state.[2]

[2] It might be argued that Privileges and Immunities Clause analysis is inappropriate for examining an in-district office rule, since such a rule would exclude some Louisiana residents as well as residents of other states. But this Court has not confined the principles of that Clause solely to those cases where a unit of government crafts a rule which benefits only state residents and disadvantages only non-residents. *See United Building & Construction Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 218 (1984). Moreover, in states with only one district, an in-district office rule would discriminate in precisely the same manner as an in-state office rule.

In a further effort to save Rule 21, respondents note that Rule 21 imposes a continuing residence/office requirement, whereas the rule in *Piper* required residence only at the time of admission to the bar. This distinction does not save Rule 21 because, as our opening brief observed (at 10), the rule puts a premium on living or having an office somewhere in Louisiana, which has nothing to do with a lawyer's competence as a federal litigator. The requirement is either underinclusive or overinclusive as a means of assuring the availability of counsel at hearings called on short notice, because it allows Louisiana lawyers who are located much further from the courthouse to be licensed, while denying petitioner the same opportunity.

The fact that this requirement is a continuing one also increases the burden of compliance and removes only one small element of the irrationalities cited in *Piper*. While *Piper* did not involve a continuing requirement, the Court's analysis regarding the availability of attorneys located "a great distance" from the state applies with equal force to continuing as well as simple residence/office requirements. 470 U.S. at 286-87. And contrary to respondents' suggestion (at 9 n.2), nothing in *In re Judd*, 391 Mass. 277, 461 N.E.2d 760 (1984), supports the notion that a continuing residency requirement would be valid.

Respondents' efforts to distinguish *Piper* cannot obscure the fact that, if anything, Rule 21 is more irrational than the rule in *Piper*. Rule 21 opens admission to the Eastern District bar not only to lawyers who live or work in the Eastern District, but also to lawyers in the two Districts immediately to the west, but not in the District immediately to the east. It is as if the rule in *Piper* required members of the New Hampshire bar to live or practice in New Hampshire, Vermont or Maine, while excluding bar members who lived and practiced in Massachusetts. Because the reasons given for invalidating the rule in *Piper* apply with equal force to Rule 21, the Court should set that rule aside.

B. Petitioner May Not Be Excluded From the Eastern District Bar On the Ground That He Is Located "A Great Distance" From the Courthouse.

Respondents urge the Court to overlook both the anomalies created by Rule 21 and the analysis employed in *Piper* because, they argue (at 19), a decision striking down Rule 21 would open admission in the Eastern District bar not only to Mississippi lawyers such as petitioner, but to lawyers from New York, Hawaii and other faraway states. The most obvious flaw with this position is that if the real concern of Rule 21 is lawyers from distant states, then there is no reason for excluding a Mississippi lawyer such as petitioner, who is only 110 miles from New Orleans. More important, this argument is foreclosed by *Piper*. After noting that a "high percentage" of nonresident applicants were likely to "reside in places reasonably convenient" to the licensing state (as is the case here), the Court stated that even if lawyers lived "a great distance" from that state, they could not be denied admission to the bar, although they might be required to affiliate with local counsel. 470 U.S. at 287. That analysis is controlling here.

Respondents counter that it is difficult to define "a great distance" and to choose between setting a boundary at 100, 150 or 500 miles. Of course, the selection of one number over another will inevitably strike some people as arbitrary, particularly if they are located just beyond the perimeter. *See City of Houston v. FAA*, 679 F.2d 1184, 1192-93 (5th Cir. 1982); *see also American Trucking Ass'ns v. ICC*, 697 F.2d 1146, 1150-51 (D.C. Cir. 1983). However, if availability for hearings is a major reason for imposing

such a geographic restriction on bar members, then almost any figure selected with that goal in mind is more likely to achieve that end than is Rule 21, which is based not on distance from the courthouse, but on Louisiana's geography.[3]

Respondents' argument is also undercut by the fact that Rule 21 allows lawyers from New York or Hawaii to join the Eastern District bar if they are willing to open an office or affiliate with a firm in Louisiana, even one located hundreds of miles from New Orleans. It is difficult to see how lawyers who reside in distant states, but who maintain a satellite office or an "of counsel" relationship with a Louisiana firm are more likely to read the Eastern District advance sheets or be available for court hearings than is petitioner, who wants to practice solely out of his office in Pascagoula, just 110 miles from the courthouse in New Orleans. Therefore, even if the Court's discussion in *Piper* about the possibility of imposing a local counsel requirement on lawyers located "a great distance" from the courthouse were applied to court rules regarding general bar admissions, it would not save Rule 21 because the restrictions in that rule are not based on distance, but rather on an in-state versus out-of-state distinction of the sort invalidated in *Piper*.

---

[3] Respondents also cite (at 25-26) that portion of Rule 45(e) of the Federal Rules of Civil Procedure which permits subpoenas to compel attendance at a hearing or trial to be served anywhere in Louisiana. The argument mixes apples and oranges. The geographic restriction in Rule 45 is intended to assure that witnesses who must appear involuntarily in court are not inconvenienced because of the distance they must travel. 85 F.R.D. 521, 535 (1980) (Advisory Committee Note). The Rule's solicitude for such witnesses has nothing to do with the issue of whether a lawyer such as petitioner, who voluntarily seeks a license to practice in the Eastern District, is fit to practice there because he neither lives nor has an office in Louisiana.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Cornish F. Hitchcock
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

Of Counsel:
Gary L. Roberts
Roberts and Clark
P.O. Box 237
Pascagoula, Miss. 39567
(601) 762-7104

April 1987

AMICUS CURIAE

BRIEF

No. 86-475

IN THE

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DAVID C. FRAZIER,

Appellant,

v.

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Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

LAWRENCE A. SALIBRA, II, ESQ.
Member, American Corporate Counsel Association
1225 Connecticut Avenue
Suite 202
Washington, D.C. 20036
(202) 296-4523

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

Amicus Curiae, American Corporate Counsel Association, respectfully requests this Court to reverse the decision of the Fifth Circuit Court of Appeals.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is composed of members of the bar who do not hold themselves out to the public for the

practice of law and who are engaged in the active practice of law as employees of corporations, partnerships, and other organizations in the private sector. ACCA is the only national bar association whose efforts are devoted exclusively to the professional needs of attorneys who are members of the legal staffs of organizations in the private sector. ACCA has approximately 7,000 members who are employed as corporate counsel by some 3500 organizations and 26 local chapters across the country.

ACCA seeks to promote rules and procedures concerning access and admission to practice so that corporate counsel can adequately manage corporate legal affairs consistent with bar authorities' and ACCA's interest in maintaining high standards of competence. The question of a lawyer's residency in a state as a qualification for admission to a United States federal district court sitting in that state is of great concern and importance to the members of ACCA and the clients they serve, because it affects the ability of corporate counsel to represent effectively their clients in the states which have such requirements for admission.

Most recent and dramatic among efforts to control litigation costs and make the litigation process more efficient has been the movement toward litigating in-house. This rule has the serious consequence of escalating the costs of and otherwise inhibiting that effort.

The challenged admission requirements do not address attorney competence. Instead, they are artificial barriers to practice which deter the provision of more cost-effective legal services to those corporations that use inside counsel. Thus, this case is of significant interest to the members of ACCA.

JURISDICTION

The jurisdictional grounds are fully set forth in the Brief of the Appellant and need not be set forth here again in accordance with Rule 36.5 of this Court.

SUMMARY OF ARGUMENT

The in-house segment of the bar is the most rapidly growing portion of the bar. The nature of corporate practice is that the in-house lawyer often needs to represent the client in a number of jurisdictions including some in which he or she has not previously been admitted to practice or has an office.

The net impact of the Eastern District Rules 21.2 and 21.3.1 limiting admission to attorneys who reside in the state and similar rules in other districts is to effectively foreclose the majority of inside attorneys from the admissions process. Under the rules, the corporate client is forced to hire local counsel, even though a particular matter could be handled more effectively by the corporation's inside counsel. Such a result is a wasteful expenditure of corporate resources without providing the client, the court or the public with an overriding benefit.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE DECISION BELOW BECAUSE IT CREATES INEFFICIENCY IN THE ADMINISTRATION OF THE JUSTICE SYSTEM AND INCREASES THE COST OF LITIGATION FOR THE CLIENTS OF ACCA MEMBERS.

There has been a recent dramatic move toward handling corporate litigation with attorneys employed in the corporate law department. This move to in-house litigation is a natural consequence of the national character of corporate practice and the economic realities of the litigation environment.

Litigating with inside counsel is an effective technique for litigation cost control. This is because an in-house legal staff can develop an intimate knowledge of the business and technology of the client. It is prohibitively expensive for outside lawyers to develop this same understanding of the details of the client's legal needs.

Further, it is unnecessarily redundant if different outside counsel must be thoroughly briefed in each jurisdiction in which the corporation may be involved in litigation.

The enormous financial savings attainable by litigating in-house have recently been demonstrated by an internal study conducted by Travelers Insurance Company. The study covered a four year period from January 1, 1980 to January 31, 1984, and involved a comparison of costs associated with property and casualty claims. Cases were randomly assigned [1] to inside and outside counsel and a comparison was made of the costs associated with the resolution of the claims. Data was arranged so that the costs of similar outcomes in terms of settlements or judgments were compared. The comparisons were then evaluated in two groups, those where settlement or judgments were below $100,000.00 or legal fees less than $20,000.00, and those with judgments above $100,000.00 or legal fees over $20,000.00. In-house costs including lawyers' salaries and all overhead expenses (less payroll taxes) were compared to outside fees and the results were dramatic. For the category below $100,000.00 and legal fees less than $20,000.00, outside counsel were 32% more expensive than inside counsel. For the category above $100,000.00 or legal fees in excess of $20,000.00, outside counsel was 90% more expensive than inside counsel. What this illustrates is that economic reality will result in more and more corporations undertaking to litigate in-house, and out of necessity, that litigation will take place on a national basis.

A similar savings was found by the Aluminum Company of America (Alcoa). As the following chart indicates, legal costs were rising to a peak in 1983 when Alcoa moved litigation in-house:

[1] Exotic cases such as large class actions and cases with no expenses were deleted from the sample.

ALUMINUM COMPANY OF AMERICA
GENERAL LEGAL COSTS *

YEAR	OUTSIDE COUNSEL	INSIDE COUNSEL	TOTAL COST
1982	$5,304,497	$4,354,202	$ 9,658,699
1983	5,162,578	5,116,646	10,279,224
1984	4,307,764	5,234,570	9,542,334
1985	3,168,021	5,737,558	8,905,579
1986 **	2,408,626	5,726,031	8,134,657

* This table does not include inside and outside patent counsel costs or cost of legal fees borne by insurance carriers.

** Estimate based on six months actual results.

Prior to 1983 all non-litigation was handled in-house; consequently the reduction in total legal expenses are attributable to Alcoa's new in-house litigation capability. As one can see from the chart, relatively modest increases in in-house legal costs resulted in substantial overall reduction of legal expenses. In 1986, for example, outside legal expenses were reduced from 1983 levels by approximately 46%. The increase in in-house expenses during the same period was only 11%, with a resulting net saving of 35%.

Other major companies have moved a substantial part or virtually all of their litigation in-house. To cite just a few other examples, Alcan Aluminum Corporation, a fabricator and seller of semi-fabricated and fabricated products, as well as aluminum-related chemicals, handles virtually all of its litigation in-house. Arthur Young & Company, an international accounting and consulting firm, also handles its litigation in-house.

The rule at issue in this case, and similar rules in other federal district courts, foreclose admission to corporate counsel who handle litigation in a district but do not reside there. Therefore, the rule substantially hinders the achievement of enormous cost savings for the company using inside litigators.

II. THIS COURT SHOULD REVERSE THE DECISION BELOW BECAUSE IT PRESENTS IN THE FEDERAL CONTEXT THE SAME ISSUES AND ARGUMENTS WHICH THIS COURT REJECTED WITH RESPECT TO THE STATES.

In *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S. Ct. 1272, 84 L.Ed. 2d 205 (1985) this Court rejected a residence requirement as a condition of admission to a state bar noting:

> In summary, the State neither advances a 'substantial reason' for its discrimination against nonresident applicants to the bar, nor demonstrates that the discrimination practiced bears a close relationship to its proffered objectives. 470 U.S. at 287.

Although *Piper* was predicated on the Privilege and Immunities Clause which does not limit federal action, the appellant in this case urges that the same analysis be "incorporated into the Fifth Amendment's Due Process Clause in the same way that equal protection analysis has been employed to review federal discrimination" or under a "more traditional equal protection analysis." See Petitioner's Brief, Petition for a Writ of Certiorari at 4. We agree because the federal restriction in this case has the same impact on ACCA members as did the New Hampshire requirement in *Piper*.

The Fifth Circuit affirmed the constitutionality of the rule in this case based upon the same rationale that was advanced by the state but rejected by this Court in *Piper*. Judge Goldberg in his dissent in the present case correctly characterized the genesis of this rationale when he said:

> The testimony excerpted here is neither extraordinary or inexplicable. Insularity and provincialism are not peculiar to the Eastern District of Louisiana but form part of a widespread, basic socio-cultural pattern. This explains why, for example, most people cheer for the 'home team', no matter how bad it is. 788 F.2d 1049, 1058 (5th Cir. 1986)

More important than its genesis is the fact that the evidence adopted by the majority in its opinion as adequate to a due process analysis suffers from the distinct lack of analytical rigor noted by Judge Goldberg:

> "I do not make a fetish of statistics. But generalized, visceral reactions and vague, anecdotal reminiscences of this sort do not rise to the level of legally probative evidence; they cannot supplant the need for hard, empirical data when the Constitution's guarantee of the equal protection of the laws is at stake. Thus, even if appellees' evidence had been relevant—which, as I have explained above, it is not—I would hold that it is insufficient as a matter of law. *Id.* at 1060.

Therefore, this Court should reverse this case for the same reasons it reversed in *Piper*.

III. *PRO HAC VICE* ADMISSION IS NOT A SATISFACTORY ALTERNATIVE.

It has been established in this case that petitioner could have practiced before the Eastern District on a *pro hac vice* basis. This Court should not assume that *pro hac vice* admissions are a solution to the problem of general admissions.

First, in certain federal district courts, *pro hac vice* admissions are limited to once a year [2] or once in a lifetime.[3] Such rules would certainly present a major obstacle to in-house counsel who have a number of cases in a particular jurisdiction. It is, in fact, these very attorneys who would seek general admission to avoid the cost and inconvenience of the *pro hac vice* process.

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[2] United States District Court for the District of Puerto Rico, Local Rule 204.2.

[3] United States District Court for the Northern District of Florida, Rule 4(D)(1).

Second, the *pro hac vice* process presents unnecessary opportunities for abuse. Members of ACCA have experienced the threatened revocation of *pro hac vice* admissions in federal courts to force settlements. For example, counsel is aware of a recent instance in which inside counsel had *pro hac vice* admission in a federal court denied apparently to force settlement or to sanction counsel for having insisted on his client's rights under the rules. When the court's action was challenged under the Fifth Circuit authority of *In Re Wilson Evans*, 524 F.2d 1004 (5th Cir. 1975), the court granted the *pro hac vice* admission but only after substantial expense was incurred by the client in preparing local counsel to try the case in the event trial commenced before the issue was resolved.

Abuse of the *pro hac vice* admission process has been detailed by various commentators. *See* Misner, *Local Associated Counsel in the Federal District Court: A Call for Change*, 67 Cornell Law Rev. 345 (1982). This article relates a case where the New Jersey District Court in New Jersey regulated *pro hac vice* admissions to prevent New York and Philadelphia lawyers from handling lucrative commercial cases:

> The Brief for Petitioner on Petition for Writ of Mandamus at 16, *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968), discusses Rule 4(C) in the following manner:
>
> > The Clerk of the District of New Jersey informed counsel for petitioners that the Rule was designed to prevent New York and Philadelphia lawyers from monopolizing lucrative commercial cases, especially FELA cases, and was waivable in the kind of case for which there was little competition among New Jersey lawyers.
>
> In a telephone conversation with Mr. Angelo Locasio, Clerk of the District of New Jersey of Feb. 10, 1976, Mr. Locasio stated that most of the out-

> of-state attorneys come from Philadelphia and New York City. The areas of law generally involved are patent law, negligence law and FELA actions, with an emphasis on the last two.
>
> The three-time limitation is not defensible in terms of administrative convenience. The Clerk of the District of New Jersey stated that his office no longer keeps strict account of the number of 4(C) appearances, for reasons of administrative convenience. If he or one of his staff recognizes the name of an attorney or a firm as having appeared in court several times, that attorney or firm will be contacted. Telephone conversations with Mr. Angelo Locasio, Clerk of District of New Jersey, February 10, 1976 and April 14, 1976. 67 CORNELL L. REV. at 360-61.

The continued misuse by both state and federal courts of *pro hac vice* admission also has been documented by the American Bar Association Center for Professional Responsibility in a 1984 report, *"Pro Hac Vice Regulation: In the National Interest?"* [4]

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[4] The report focuses on how denial of *pro hac vice* admissions can be used to deny representation for political reasons. The report states in part:

> "In 1973 this Association's Special Committee on Courtroom Conduct (hereafter Special Committee) recommended that courts deny *pro hac vice* applications only in certain highly-restricted circumstances. The Special Committee concluded that a court:
>
> > . . . cannot and should not bar an out-of-state lawyer from appearing if 1) he is willing to have local counsel associate himself with the case to familiarize the foreign lawyer with local practice, and to obtain service of papers, and 2) the out-of-state lawyer has no present disability or limitation on his right to practice in his own state.
>
> Eight years later, in apparent disregard of these standards, Chokwe Lumumba, an out-of-state attorney in good standing with the bar of his home jurisdiction, was prohibited (albeit

Third, the local counsel requirement is a costly anachronism of the district court's *pro hac vice* rules. The rationale for local counsel is predicated on two grounds —the availability for emergency hearings and familiarity with local rules. *Amicus* has serious doubt as to whether local counsel, in fact, are more familiar with local rules than nonresident counsel who conduct a great deal of litigation in the district. However, even if there is merit to that position, requiring the purchase and review of the local rules would be a considerably less onerous alternative.[5]

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temporarily) from visiting a client in jail and representing her in a criminal case pending in the United States District Court for the Southern District of New York, solely because of his political beliefs and associations.

As a result of the Lumumba case, the Committee on Legal Education and Admissions to the Bar and the Committee on Criminal Advocacy have determined that the conclusion of the Special Committee should be re-affirmed and amplified. We believe it particularly important to express clearly our opposition to the exclusion of lawyers from courtrooms for political reasons, whether or not they are members of the bar of the particular court. We hope that, as one of the by-products of this report, future attempts will not be made to disqualify criminal defense attorneys based upon their politics, no matter how heterodox. If we are successful in achieving that goal, we believe that, in addition to promoting observance of basic constitutional values, the appearance and the administration of impartial justice will be better served. *Pro Hac Vice Regulation: In the National Interest?* Report of the Center for Professional Responsibility, A.B.A., 199-200 (1984).

[5] This Court rejected a similar argument in *Piper*:

There is no evidence to support the State's claim that nonresidents might be less likely to keep abreast of local rules and procedures. Nor may we assume that a nonresident lawyer —any more than a resident—would disserve his clients by failing to familiarize himself with the rules. As a practical matter, we think that unless a lawyer has, or anticipates, a considerable

Finally, justifying the local counsel requirement on the basis that the attorney will be available in an emergency is unsound for two reasons. First, even if local counsel were the only one available, it is unlikely he or she would know enough about the case to be helpful. In fact, this requirement runs directly counter to the key reason for having a non-resident counsel in the first instance—the client does not want to re-educate another lawyer. Second, those situations where there is an emergency can be effectively handled by teleconference regardless of the location of the lawyers. More and more courts are utilizing teleconference technology for oral arguments in situations where personal appearance had been the only alternative.

As this Court noted in *Piper*, "in many situations, unscheduled hearings may pose only a minimal problem for the nonresident lawyer. Conference telephone calls are being used increasingly as an expeditious means of dispatching pretrial matters." 470 U.S. at 286, n.21.

CONCLUSION

Amicus has been active in helping to solve the litigation congestion of our court system and in seeking ways to reduce the costs of resolving disputes. *Amicus* believes that litigation costs can be substantially reduced by using inside counsel. The detailed study of Travelers Insurance Companies and the growing use of in-house litigation by other major companies demonstrates the enormous savings potential of in-house litigation. The rule at issue in this case effectively impedes the growing practice of in-house litigation, and substantially increases the costs associated with the use of the courts without offsetting benefits to judicial administration. For this reason, and

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practice in the New Hampshire courts, he would be unlikely to take the bar examination and pay the annual dues of $125.00. 470 U.S. at 285.

because of its conflict with this Court's decision in *Piper*, this Court should reverse.

Respectfully submitted,

LAWRENCE A. SALIBRA, II, ESQ.
Member, American Corporate
Counsel Association
1225 Connecticut Avenue
Suite 202
Washington, D.C. 20036
(202) 296-4523

January 16, 1937

AMICUS CURIAE

BRIEF

No. 86-475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID C. FRAZIER,

Appellant,

v.

HONORABLE FREDERICK J. R. HEEBE, Chief Judge, United States District Court for the Eastern District of Louisiana, *et al.*,

Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

LAWRENCE A. SALIBRA, II, ESQ.
Member, American Corporate
Counsel Association
1225 Connecticut Avenue
Suite 202
Washington, D.C. 20036
(202) 296-4523

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Corporate Counsel Association (ACCA), seeks leave to file the attached brief *amicus curiae* in the above action. ACCA has secured permission to file this brief of the appellant Frazier but not of the appellee, the Honorable Frederick J.R. Heebe, et al.

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is composed of members of the bar who do not hold themselves out to the public for the practice of law and who are engaged in the active practice of law as employees of corporations, partnerships,

and other organizations in the private sector. ACCA has approximately 7,000 members who are engaged in legal matters arising in a number of jurisdictions.

More and more corporations use attorneys employed in the corporate law department to handle litigation. Corporate practice is national in nature, and therefore, these attorneys must routinely handle litigation in a number of different jurisdictions. Because *pro hac vice* admissions and the need to associate with local counsel can be excessively burdensome and unnecessarily costly, corporate counsel often seek bar admissions in several federal district courts. The decision below upholding residency requirements for admission to federal district courts will result in a wasteful expenditure of corporate resources without providing the client, the court or the public with an overriding benefit.

The question of a lawyer's residency in a state as a qualification for admission to a United States federal district court is of great concern and importance to the members of ACCA and the clients they serve, because it affects the ability of corporate counsel to represent effectively their clients in those federal jurisdictions with such residency requirements.

Respectfully submitted,

LAWRENCE A. SALIBRA, II, ESQ.
Member, American Corporate
Counsel Association
1225 Connecticut Avenue
Suite 202
Washington, D.C. 20036
(202) 296-4523

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